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v. 3062

No. 15863 ✓

United States Court of Appeals
For the Ninth Circuit

POPE & TALBOT, INC., a corporation, *Appellant*,

vs.

JACK V. CORDRAY, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE

ZABEL & POTH

By PHILIP J. POTH

Attorneys for Appellee.

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Appellee.

No. 15863

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

A judgment on a jury's verdict was entered against the appellant on November 18, 1957, in the District Court for the Western District of Washington, Northern Division (R. 34). The cause giving rise to the judgment was tried before the Honorable John T. Bowen, sitting with a jury on the civil side of the court.

The appellee alleged that he was injured aboard appellant's vessel while it was in navigable waters (R. 8, 9). Diversity of citizenship was both alleged and admitted (R. 7, 17).

After consideration of the grounds asserted for a new trial, or judgment notwithstanding the verdict, the court made its order denying the same on the 13th day of December, 1957 (R. 38). This appeal has followed.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is conferred by the provisions of Title 28, U.S.C.A. §1332.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this Court is granted by the provisions of Title 28, U.S.C.A., §1291, which gives to the Courts of Appeal jurisdiction of all appeals from final judgments of District Courts.

STATEMENT OF THE CASE

The facts relating to liability in this cause are uncomplicated. They are as follows:

1. The Appellee Was Injured Aboard Appellant's Vessel While It Was in Navigable Waters

The record shows that the appellee was aboard appellant's vessel, the P & T ADVENTURER, on the morning of July 15, 1956, while the ship was moored in navigable waters alongside Pier 48 in the Port of Seattle, Washington (R. 53, 54). This was also admitted by the appellant (R.17, 18).

2. The Appellee Was a Foreman of Longshoremen Engaged in Handling the Vessel's Cargo

The appellant's vessel, the P & T ADVENTURER was moored at said Pier 48, for the purpose of discharging the vessel's cargo. Appellant's contract of carriage concerning the cargo required that it raise the cargo out of the hold and stow it in the warehouse (R. 355, 356, 357). Aside from contract responsibility the necessity of utilizing longshoremen to carry the ship's cargo to a place

of stowage in the warehouse is shown by the testimony of appellant's supercargo and own witness (R. 339).

“Q. Well, now, is it necessary to carry that cargo away and stow it in the dock, or can you just leave it at the ship's side?

A. Oh, no, you can't, you've got to take it away from the ship's side. You wouldn't have any place to put it.

Q. And you have to take it in and stow it in the warehouse, isn't that correct?

A. That's right.”

The ship's cargo on the vessel on which appellee was injured was in a continuous process of movement from the hold of the vessel to a place of rest in the warehouse (R. 185, 186). Mr. Cordray was a foreman of longshoremen whose duties were as follows (R. 292):

“Q. And what were your duties there that night?

A. My duties were to see that the cargo was moving from the ship to the dock or from the dock to the ship, see that the cars were under the gear so the gear wouldn't be hanging at any time.”

His employer described appellee's duties at the time of his injury (R. 180):

“A. Well, he is a supervisory employee who directs the work of the longshoremen on the terminal in the physical movement of the cargo.”

Two stevedoring companies were employed in the cargo operation. The longshoremen on the ship were employed by the Seattle Stevedoring Company (R. 128) and the longshoremen on the dock were employed by Olympic Steamship Company (R. 184, 185). The appellee was a foreman of the dock longshoremen (R. 52).

Each had a contract with appellant for the handling of the ship's cargo in order that the appellant could fulfill its contract of freightment with shippers, with respect to the vessel's cargo.

An excellent summary of the evidence in this respect is contained in the admissions in open court made by appellant (R. 350) :

“THE COURT: Now wait just right there. What is your contention on that point? Do you agree up to this point about what the contractors and each of them agreed to do? Is that in accord with your understanding of this situation?

“MR. HOWARD: Well, your Honor, I agree that the admitted fact is that the Seattle Stevedoring Company had a contract with Pope & Talbot to load and discharge cargo from the vessel. I also agree that Pope & Talbot had arranged with Olympic Steamship Company as a public terminal operator to handle the cargo on the dock.

“THE COURT: The public terminal operator?

MR. HOWARD: As a public terminal operator.

“THE COURT: Then I do not see how—whose invitation or contract started whichever one of these stevedores, contracting stevedores, to work on the dock and on the ship? Whose word was it that started one working on the ship and the other one working on the dock?

“MR. HOWARD: Pope & Talbot, your Honor.

“MR. POTH: Pope & Talbot, your Honor.

“THE COURT: Pope & Talbot in both instances put out the word that put the two stevedoring concerns to work, is that right? (426)

“MR. HOWARD: I don't think there is any dispute about that in the evidence.

“THE COURT: And you do not seek to show it was for any other purpose, it was for the purpose of discharging the steamship carrier’s obligation to carry and deliver cargo to the consignee that these two things were done?

“MR. HOWARD: Yes. We haven’t had testimony on that, but I expect this witness will give that testimony. (427) * * *

Further clarification is also contained in the following admissions of the appellant (R. 325, 326):

“THE COURT: In that connection do you argue or do you contend that this Court must find as a matter of law that on the evidence in the case up to now it was a part of the shipping contract to put this cargo at the places where plaintiff and his crew were engaged in putting it at the time of the accident and that that obligation on this carrier was a part of the carriage contract? Do you make any contention like that?

“MR. HOWARD: We have made no contention to that effect, your Honor. However, we don’t deny that it is part of the obligation of the steamship company as carrier to not only raise the cargo out of the hold and land it on the dock, but also to place it in the warehouse.

“THE COURT: Where these men foremanned by the plaintiff were putting it or engaged in putting it at the time of the accident?

“MR. HOWARD: That’s right, yes, your Honor.

“THE COURT: I believe that will have to determine the Court’s ruling upon this motion. (373)”

The foregoing clearly shows that the appellee was a vital cog in the unloading of appellant’s vessel. All of his duties related to the direct flow of the ship’s cargo to

its place of stowage upon the pier. At all times he was performing an essential service to the vessel in the handling of its cargo. Without his efforts and the labor of the longshoremen under his supervision, the vessel's unloading could not have been accomplished, or its contract of carriage fulfilled.

3. The Appellee at the Time of His Injury Was in a Place Aboard the Vessel Where It Was Necessary for Him to Be in Connection with His Cargo Handling Duties

It was necessary for the appellee, in the performance of his duties towards the discharge of the vessel's cargo, to alternate his movements between the ship and the pier (R. 52, 53).

The work of discharging the cargo had to be coordinated between the longshoremen working aboard the ship, and the longshoremen working on the pier. The latter are also classified as longshoremen (R. 219, 246).

The deposition, taken at the instance of the appellant, of Melvin M. Stewart, manager of the Olympic Steamship Company, plainly describes the necessity of appellee's alternation between the ship and dock in connection with the handling of the ship's cargo (R. 191).

“Q. Now, I believe you mentioned a part of his job in seeing that cargo was moved to its first place of rest from ship's tackle was the coordination of dock handling with the work aboard ship of handling cargo, is that correct?

A. I don't recall that. That is correct. I don't recall if I made that statement or not.

Q. But that is correct? He has to coordinate the two operations together, is that right?

A. Well, he has to coordinate to have terminal employees and equipment available at the end of ship's tackle to keep the cargo moving.

Q. Now, is it ever necessary to achieve that coordination that a dock foreman go aboard the vessel?

A. Yes, it is.

Q. And I will ask you whether or not it is the custom and practice for a dock foreman to go aboard a vessel to give orders and to make arrangements for this coordination of ship's tackle and dock equipment?

A. Yes, it is a common practice."

The appellee at the time of his injury was aboard the vessel for the sole purpose of coordinating the cargo handling work of the dock-longshoremen with that of the longshoremen working on the ship. Robert L. Peters, the foreman for Seattle Stevedoring Company, testified as follows (R. 54):

"Q. And what conversation did you have with him, if any?

A. Well, he came up and stood alongside of me on the deck right opposite the hatch and he asked me what I was going to do with the gang, so that he would know whether to lay his bull driver off or whether to keep him. A lot of times when we're finishing a ship like that we may cover one hatch and then put a gang into another hatch to load dunnage or ship's gear or whatever might be there to load. The first gang that finishes usually jumps from one hatch to the other to clean up different items that have to be done.

Q. And whereabouts were you and he on the

P & T ADVENTURER when you had this conversation?

A. We were standing just abreast of number two hatch on the starboard side.

Q. And what then happened, if anything?

A. Well, at that particular time just as he started to question me as to what we were going to do with the gang, we were winging in the gear to get it inside so we could shift the gang to another hatch.

Q. All right, and then what happened?

A. During that conversation while he was asking me what I was going to do with the gang the boom was wung in over the edge of the ship and the block on the tent gantline dropped and hit him on the side of the neck and the head."

Aside from the necessity of alternating between the ship and the dock for the purpose of coordinating the flow of cargo, the record shows that the appellee had been expressly invited aboard the vessel by the appellant's own supercargo (R. 294):

"A. The first time we went aboard the ship I went aboard the ship with the dock supervisor. His name is Mr. Wallace. There was cargo coming out of number four hold or number five, I'm not positive which one, and there were cars—it was stuff going into cars, gondolas. The stuff that was supposed to come out first was in such a position, I guess, that they couldn't get it out first, so the supercargo asked Mr. Wallace and I to come up and look down the hatch and see why they had to have a different car under the dock—under the hook. We had to go up there because we had to shift these other cars to get in the car that was supposed to be for that certain cargo.

Q. Then did you have occasion to go aboard after that?

A. Well, if I'm not mistaken we had went up, Mr. Wallace and I had went up twice with the supercargo. The supercargo had told me before midnight that some of these gangs were going to work till after five o'clock in the morning.

Q. All right. Now, is it a custom and practice to go aboard ships on the part of dock foremen?

A. All the jobs that I've been on I've seen it, it has been a practice." * * *

The appellee, Jack V. Cordray, further testified as to the reasons for his presence aboard the vessel in connection with the handling of its cargo (R. 294, 295, 296):

"Q. (By MR. POTH): What is the necessity, if any, of a dock foreman going aboard in regard to discharging operations of a ship?

A. Well, there's quite a few of them. Some of them, you go up there, you're bringing out different kind of cargo. You want to find out what they are going to bring out next so that you can have the gear ready on the dock. If they are bringing out general cargo on boards, you have boards under the hook. Maybe they'll say, 'In a little while maybe you're going to get tires.' If they bring out tires they do not bring them out on boards, you have to have a different kind of equipment for your bull driver to haul the tires away, and you get your information there.

Q. What other examples?

A. Well, I've had to go up there and ask the foreman, like that night when I went up I asked him, I said, 'Is this gang going to go home or are they moving to another hatch?' Mr. Peters says,

‘Somebody, I don’t know who, has changed their mind.’

Q. What time did you go aboard?

A. The last time?

Q. The last time.

A. Well, it was approximately a quarter to five.

Q. I didn’t quite catch that.

A. Approximately a quarter to five.

Q. And what was your purpose in going aboard?

A. The reason I went up, I went up on the gang-plank, I seen Mr. Peters standing by number two. I went up to ask Mr. Peters if this gang was going to go home or shift to another hatch, and I had to have that information so I could let the drivers on the dock go or keep them.

Q. Now, as far as that gang aboard the ship was concerned, if you had let your bull drivers go without consulting Mr. Peters would the ship gangs have been able to continue work?

A. No.

Q. Why?

A. Because you have to have the drivers to give them the cargo or the dunnage or whatever they need.”

4. The Cause of Appellee’s Injury Was the Unseaworthiness of the Vessel’s Gantline Block and Pennant

Evidence in the record shows that the wire strap, securing the block which fell upon appellee, was completely rusted through (R. 62, 66, 130, 131, 198, 199).

The block was hanging free before it fell. There was no strain upon it. The sole cause of its falling being the unseaworthy condition of the wire strap suspending it (R. 58, 59, 136, 137, 139).

QUESTION PRESENTED

Does a Longshoreman Handling Cargo on a Pier, Lose His Status as a Longshoreman When His Cargo Handling Duties Take Him Aboard the Vessel

Appellant has advanced in various ways numerous contentions of error with respect to the liability. However, reduced to their essence, appellant's contentions orbit around the above-stated question. This plainly appears in the Summary of Argument set forth at page 15 in appellant's brief.

A. "A dock foreman (such as appellee) * * * who is injured while temporarily aboard the vessel, is not within the classes of persons entitled to recover * * * on the basis of unseaworthiness."

B. "A dock foreman * * * is not an *invitee* but only a licensee while briefly aboard the vessel * * *."

ARGUMENT

The Scope of the Doctrine of Seaworthiness as Expressed by the Supreme Court Clearly Embraces the Longshoreman on the Pier Engaged in Loading or Unloading the Ship

An analysis of the contentions of appellant presents the anomalous situation, whereby the appellee could recover if he was standing on the pier when struck by the ship's block, but negates recovery because his longshore duties took him aboard the vessel.

Such a position is not tenable as a matter of law, or consonant with the practical mechanics of loading and unloading a vessel. It has been said many times that the work of loading and unloading a vessel was historically done by the crew. As a practical matter, how could any

ship have been loaded or unloaded if part of her crew did not work ashore handling the cargo? The hands of the crew were of necessity the motive agency in the flow of cargo between the ship and its place of stowage on the pier.

It has now been firmly established in the law that workmen engaged on a pier in handling cargo in direct transit to and from a ship are longshoremen entitled to the vessel's warranty of seaworthiness. A leading case in point is the *Strika* case. The District Court in *Strika v. Holland America Line, et al.*, 90 F.Supp. 534, said as follows:

“The scope of the doctrine of seaworthiness as expressed by the Supreme Court clearly embraces the longshoreman on the pier engaged in loading or unloading the ship, for, as the Supreme Court stated: ‘Historically the work of the loading and unloading is the work of the ship’s service, performed until recent times by members of the crew. That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker’s hazard and should not nullify his protection. Not the owner’s consent to liability, but his consent to performance of the service defines its boundary.’ *Sieracki* case, 328 U.S. 96, 66 S.Ct. 878, 90 L.ed. 1099.”

The court below was upheld on appeal in *Strika v. Netherlands Ministry of Traffic* (2 Cir.) 185 F.2d 555, certiorari denied, 341 U.S. 904, 95 L.ed. 1343, 71 S.Ct. 614. The appellate court also held that a longshoreman injured ashore by unseaworthiness of ship’s gear has an action for indemnity against the ship owner.

The *Strika* case has also been cited by the Supreme

Court in a footnote to its decision in *Alaska Steamship Co. v. J. O. Peterson*, 347 U.S. 396, 74 S.Ct. 601, 98 L.ed. 798:

“See *Strika v. Netherlands Ministry of Traffic* (2 Cir.) 185 F.2d 555, allowing recovery from a shipowner for an injury suffered by a longshoreman while on shore, but caused by the ship’s unseaworthy tackle.”

A discussion of the *Strika* case is contained in *Harvard Law Review*, Vol. 64, p. 996 (1950-51):

“Maritime Law has traditionally given the seaman the right of indemnity from the shipowner for injuries caused by the ship’s unseaworthiness. See *The Osceola*, 189 U.S. 158, 175 (1903). In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), this right was extended to a longshoreman injured aboard ship, though employed by a stevedore contractor hired by the shipowner, the court reasoning that since the risks arise out of work in the service of the ship, the right had its origin in the ‘status’ of the person performing that work rather than any contractual relationship of employment. Consequently longshoremen performing what in the past had been seamen’s work were held entitled to the right of indemnity from the owner for unseaworthiness, though not directly employed by him. Cf., *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). There would seem to be no rational basis for granting this remedy only where the injuries occurred aboard ship, and the instant case quite logically extends it to the longshoremen engaged in loading the ship though working on the dock.”

Another case directly in point is *Valerio, et al., v. American President Lines, Ltd., et al.*, 112 F.Supp. 202:

“Valerio and Russo became infected while working on the dock. Valerio handled not only the drums but also the hooks which, whether supplied by the ship or contractor, constituted a part of the ship’s discharging equipment which the ship was required to maintain seaworthy and the oil on which rendered the ship unseaworthy. Both were engaged in unloading cargo under a contract between the shipowner and the employer of the libellants which expressly provided for the sorting and stacking of the cargo man high on the pier upon the discharge of the vessel, and for tiering above man high upon the discharge at extra cost. Both were engaged in the maritime service of unloading the ship and were injured by contact with cargo known to be hazardous and requiring special precaution. See *Strika v. Netherlands Ministry of Traffic* (2 Cir., 1950) 185 F.2d 555, 64 Harvard L. Rev. 996, 46 U.S.C.A. §740, and accordingly the shipowner is also liable to them.”

The appellant has objected to the court’s use of the term (R. 44) “foreman of the dock-working longshoremen” (appellant’s brief, page 11). Appellant submits that the appellee should have been designated as “a shoreside or dock worker” (appellant’s brief, page 21), or one of the “shoreside-dock workmen” (appellant’s brief, page 24).

The foregoing authorities classify the appellee as a longshoreman. There is no question in the Record in respect to this nomenclature. The undisputed evidence gives him such a status as a matter of law. The appellant produced no evidence to contradict either the duties or the calling of the appellee. However, a play on names is not important to the issues in this cause. Sole impor-

tance belongs to the nature of the work of the appellee and of those employed under him. The record is clear that at all times the appellee was performing a direct service to the ship in the handling of its cargo. He was not performing work for a shipper or a consignee. He was doing work for which the ship was solely responsible—which was the discharging of cargo to a place of stowage on a pier. This was plainly longshore work as it is everywhere known. The ship was therefore obliged to furnish him the guarantees due a cargo handler, whether he be called a longshoreman, laborer, or commodity moving specialist. The court was therefore justified in giving the stock instruction on seaworthiness.

The Supreme Court in *Pope & Talbot v. Hawn* (1954) 346 U.S. 406, 98 L.ed. 143, said as follows:

“Sieracki’s legal protection was not based on the name ‘stevedore’ but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subject to the same danger. All were entitled to like treatment under the law.”

A Longshoreman Aboard a Vessel in the Performance of His Duties in the Unloading of Its Cargo Is Not a Mere Licensee or Trespasser

The appellant further contends that the appellee was

at best a mere licensee when he was injured aboard the vessel. In support of this position appellant makes two assumptions (appellant's brief, page 21).

“He had no work to perform aboard the vessel which was of any benefit to appellant shipowner, and he happened to be aboard only to obtain information to aid him in conducting his shoreside duties.”

All of the testimony is to the contrary in respect to appellant's assertion that appellee had no duties aboard the ship that were of benefit to the shipowner. Appellant produced no evidence on this subject. As previously shown in appellee's statement of the case, appellee was obliged to alternate between the ship and the dock in order to coordinate the ship and dock cargo handling. It is so obvious that appellee's work of keeping the cargo moving, was of prime benefit to the shipowner, that it scarcely deserves comment.

The second assumption to the effect that appellee was aboard the ship in aid of conducting his shoreside duties is correct. But appellant's inference drawn therefrom is incorrect. Overlooked by appellant is the fact that appellee's shoreside duties concerned the direct handling of the ship's cargo to its place of rest upon the pier, which was work in the ship's service. Also overlooked is the fact that the shipowner had contracted with appellee's employer to fulfill the appellant's obligation of stowing the cargo on the dock. Again it scarcely deserves comment that these “shoreside duties” were actually the ship's duties.

Contrary to contentions contained in appellant's brief, the court below gave the appellant an extremely

favorable position in instructing the jury on appellee's presence aboard the vessel (R. 404).

"In order for the plaintiff to recover, you must in any event find from a preponderance of the evidence that the plaintiff was at the time of the accident in a place aboard the vessel where it was reasonably necessary for him to be in the performance of his duties as foreman of the dock-working longshoremen assisting on the dock in the discharge of the vessel's cargo.

"If you do not so find, plaintiff would be in a status similar to that of a person without any employment connection with the unloading work at hand, and in that event plaintiff would not be entitled to recover in this case."

The appellant cites no authorities but contends that the court made an unwarranted finding of fact when it told the jury the following (R. 437):

"The employees of each of such contractors in their work had the right to go upon such places under defendant's control as were reasonably necessary in the performance by such contractors' employees of their work of discharging said cargo from vessel hold to point of rest on the floor within the dock warehouse."

This statement of the court is based upon undisputed evidence. The appellant offered no testimony to contradict it. The rule in respect to such a statement by the trial judge is well settled. It has long been held that an instruction is not objectionable for assuming an uncontroverted fact, or one which is admitted or conclusively proved. In *Tuttle v. Detroit, G. H. & M. Ry. Co.*, 7 S.Ct. 1166, 122 U.S. 189, 30 L.ed. 1114, it was said:

"In making this statement the judge was fully

borne out by the testimony and there was no evidence to contradict it.”

Another case in point is *Terminal R. Ass'n. of St. Louis v. Fitzjohn*, 165 F.2d 473:

“The difficulty with defendant’s position is that there was no substantial dispute about the facts and the court in applying the law to those facts could permit of no other conclusion than that plaintiff was an employee of the defendant. It is not necessary under those circumstances to submit to a jury issues of fact about which there is no real dispute. *Federal Savings & Loan Ins. Corp. v. Kearney Trust Co.* (8 Cir.), 151 F.2d 720; *United States Coal Co. v. Pinkerton* (6 Cir.) 169 Fed. 536; *Toledo St. S. & W. R. Co. v. Kountz* (6 Cir.) 168 Fed. 832.”

However, the trial judge did not remove any issue of fact from the jury’s consideration as contended by appellant the court properly instructed the jury as follows (R. 416):

“While it would be proper for me as the trial judge to analyze the testimony and to give you my understanding of it, which, however, would not be binding upon you, my purpose is not to intimate to you any opinion I may have of any fact or the weight of any evidence, and if I refer or have referred to any facts in the case, it will not be and has not been for the purpose of indicating to the jury any opinion I may have of the facts, but simply to illustrate some proposition of law which is involved with the facts.”

It has likewise been long settled that a trial judge in the Federal Courts may comment on the evidence. Here the trial judge expressly advised the jury in the above instruction that they were not to be bound in their de-

liberations by any statement of fact that he had made. They were further told that they were the sole and exclusive judges of the evidence (R. 413, 414). The rule in this respect has been stated in *Vicksburg & M. R. Co. v. Putnam*, 7 S.Ct. 1, 118 U.S. 545, 30 L.ed. 257:

“In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment on the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error.”

The rule has also been stated in *Meadows v. United States*, 144 F.2d 751:

“The rule in the federal courts is different from that in the North Carolina courts and we have repeatedly held that as long as the judge tells the jury that they are the sole judges of the facts, under the evidence, as the judge here did, he may comment in a proper way, upon the facts and the evidence. *Lovejoy v. United States*, 128 U.S. 171, 9 S.Ct. 57, 33 L.ed. 389.”

In support of its contention that appellee was at best a mere licensee as a matter of law, appellant cites numerous cases. All of these cases, without exception, concern persons, who in the words of *Berryhill v. Pacific Far East Line*, 238 F.2d 713, “had nothing to do with the loading or unloading the ship.” No case of a cargo handling longshoreman or his foreman is cited.

Examples of cases cited by appellant are as follows:

The Germania, 10 Fed. Cases 225, No. 5360:

“This was a libel *in personam* brought by several insurance companies to recover amounts paid by them respectively on policies of insurance on damaged wheat.”

The Washington (Supr. Ct. Cal., 1930) 292 Pac. 120, 1930 A.M.C. 1849:

“Joseph D. Teehan, a civil service employee of the City of Oakland, sustained injuries to his head and spine when he fell on the steamer Washington * * *. While he was required to check all property arriving on or leaving the wharf, he took no part in the actual loading or unloading of vessels and exercised no contract over persons engaged for that purpose.”

Lee v. Pure Oil Co. (C.A. 6, 1955) 218 F.2d 711:

Here a bakery truck driver fell on somebody else's barge while attempting to go to a ship moored on the other side of the barge.

“Indeed he was performing no service at all to the barge alleged to be unseaworthy, but to the ‘Charles W. Snider’ even assuming that a provisioner performs a ship's service.”

Swanson v. Luckenbach S. S. Co. (C.A. 9, 1927) 17 F.2d 735, 736.

This case concerned the employee of a shipper.

“He was not employed by, and rendered no service to, the defendant, nor did he have anything to do with the stowing of the cargo * * *.”

The Sudbury (D. Ore., 1926) 14 F.2d 533-34:

“He was on the vessel for the purpose of ascer-

taining facts, if he could, that would form the basis of a claim against the boat or the stevedoring company.”

The Second Circuit case of *Guerrini v. U. S.* (C.A. 2, 1948) 167 F.2d 352, involving a ship cleaner, quoted by appellant in its brief, is now of purely academic interest. It has been overruled by the Second Circuit in *Halecki v. United N. Y. & N. J. S. H. P. Ass'n.* (C.A. 2, 1958) 251 F.2d 708.

“It is now clear we were wrong both in limiting the warranty to those doing longshoreman’s work and in supposing the surrender of ‘control’ of the ship was relevant. We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot v. Hawn*, *supra*, 346 U.S. 406, 74 S.Ct. 202, 98 L.ed. 143. * * * Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot v. Hawn*, *supra*.

The Simplicity of the Cause Required No Special Form of Verdict

This cause did not differ from a host of other maritime causes tried to a jury on the issues of negligence and seaworthiness. Appellee knows of no rule requiring maritime causes of action to be submitted to a jury by way of special interrogatories. The appellee agrees with the appellant when it states in its brief, pages 42 and 43, that special interrogatories are to be considered as a matter within the “sound discretion” of the trial judge, but appellee disagrees with appellant’s interpretation of this Court’s decision in *United Pacific Railroad Co. v. Bridal Veil Lumber Co.* (C.A. 9, 1955) 219

F.2d 825, 831. Appellant interprets this decision as holding that special interrogatories are important and necessary in a negligence case (Appellant's Brief, page 43). Actually the court said this form of verdict has "pit falls."

"It is true that Rule 49(a) of the Federal Rules of Civil Procedure 28 U.S.C.A. has eliminated many of the inherent dangers of special verdicts consisting solely of answers to interrogatories unaccompanied by a general verdict * * *. But to say 49(a) has improved the usability of the special verdict is not to say the special verdict no longer has pitfalls."

The Amount of the Award of Damages Is Supported by the Evidence

The appellee was struck on the head and neck by a heavy gantline block and wire strap (R. 54). He was immediately hospitalized for two days. However, he became worse and was rehospitalized from the 28th of August until the 15th of September (R. 297, 298). He continually suffered from pain and terrific headaches (R. 298, 302).

"A. I have pain continuously in the right side of my neck. If I work steady on these rough docks and the rough holds of the ships I get these tremendous headaches and stiff necks. On many jobs I've had to quit because I can't stand it, and I'm not putting in today the hours I should be putting in."

He has never been free of pain since the injury (R. 307). The nerves of his fingers are affected (R. 306). Because of his injuries he has had to give up various

forms of recreation, including the managing of Little League baseball and football teams (R. 307). He has continually lost work on account of the injury (R. 302). His injury has prevented him from working steady (R. 307, 308).

The attending physician related the long course of treatment he has given the appellee (R. 151, 152, 153, 154, 155). He described the pain and suffering that the appellee has been enduring and stated that in his opinion appellee's troubles were caused by the accident aboard appellant's vessel (R. 156). He further found damage to the disk between the vertebrae at about the level of the seventh cervical vertebrae (R. 157, 158). He testified that the effects of the injury are substantially permanent (R. 162). He further stated that by reason of the injury appellee is unable to do the full-time work of a longshoreman (R. 169, 170), and finally it was testified by this attending physician and surgeon that the appellee may require surgical treatment to attempt to relieve pinching or the pressure on the nerves (R. 159).

The degree of injury and the amount of the damages were considered both by the jury and the trial judge that had the opportunity of personally seeing the appellee and hearing his testimony, and the testimony of other witnesses.

The appellant, in its brief, asks this Court to reduce the damages as a condition for not requiring a new trial (Appellant's Brief, page 42). However, the rule is that the result should be left to turn upon the good sense and

deliberate judgment of the judge and jury assigned by the law to ascertain what is just compensation for the injuries inflicted. This rule was announced in the *City of Panama*, 101 U.S. 453, 464, 25 L.ed. 1061 :

“When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted.”

There is no fixed standard to measure compensation for pain and suffering. This likewise is a matter that should be left to the trial judge and jury who heard and saw the injured party. This Court said in *United States v. Luehr*, 208 F.2d 138 (9th Cir.) :

“Such computations necessarily involves a high degree of speculation, but there are aspects of the situation on which one need not speculate. The court judicially knows that the value of the dollar continues to decline and that wages, including the wages of longshoremen, steadily pursue their ascending spiral. * * * We know of no standard by which to measure compensation for pain and suffering. On the whole we are not persuaded that the trial court’s award is excessive.”

In *Pacific Greyhound Lines v. Rume*h (C.A. 9, 1949) 178 F.2d 652, this court also said

“damages for pain and suffering are peculiarly within the discretion of the jury.”

In *Southern Pacific Co. v. Guthrie* (C.A. 9, 1951) 186

F.2d 926, this court said, in referring to the review of the amount of an award,

“But this power and duty belongs exclusively to the trial judge.”

CONCLUSION

Appellee respectfully submits that the verdict of the jury was based upon substantial evidence, and that the judgment of the trial court should be affirmed.

Respectfully submitted,

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**United States Court of Appeals
For the Ninth Circuit**

POPE & TALBOT, INC., a corporation, *Appellant*,
vs.
JACK V. CORDRAY, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANT

FILED

APR 26 1958

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United States Court of Appeals
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United States Court of Appeals

For the Ninth Circuit

POPE & TALBOT, INC., a corporation,	}	No. 15863
<i>Appellant,</i>		
vs.		
JACK V. CORDRAY,	<i>Appellee.</i>	

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANT

I.

JURISDICTION

This civil action was commenced in the Superior Court of the State of Washington for King County by Summons (R. 6) and copy of Complaint (R. 7) served upon Appellant on August 21, 1956.

Verified Petition for Removal (R. 3) of the cause was filed in the United States District Court, Western District of Washington, Northern Division, by Appellant on September 5, 1956 (R. 10), based upon diversity of citizenship of the parties and amount in controversy in excess of \$3,000, exclusive of interest and costs. The Complaint alleged a cause of action for personal injuries as a result of an alleged maritime tort, prayed for damages in the sum of \$75,000, and alleged that plaintiff (Appellee) was a citizen and resident of the State of Washington while defendant (Appellant)

was a foreign corporation and a non-resident of the State of Washington (R. 7).

After jury trial commencing on November 7, 1957 (R. 48) and ending on November 15, 1957, a verdict in favor of the plaintiff (Appellee) and against the defendant (Appellant) was returned and filed on November 15, 1957, and entered on November 18, 1957 (R. 33).

Judgment on the verdict was entered on November 18, 1957 (R. 34). Order denying Appellant's post trial motions was entered on December 13, 1957 (R. 38).

Notice of Appeal was served and filed on December 16, 1957 (R. 42). A Cost and Supersedeas Bond in the sum of \$32,000, approved by counsel for Appellee and by the trial Court, was filed on December 13, 1957 (R. 39-42).

Jurisdiction of the U.S. District Court for the Western District of Washington, Northern Division, is based upon Title 28 U.S. Code Section 1332 and Title 28 U.S. Code Section 1441.

Jurisdiction of the U.S. Court of Appeals for the Ninth Circuit is based upon Title 28 U.S. Code Section 1291.

II.

STATEMENT OF THE CASE

A. The Pleadings

By his original Complaint (R. 7) the Appellee sought to recover damages for personal injuries sustained while Appellee was aboard the SS P&T ADVENTURER

at a dock in the Port of Seattle on July 15, 1956. Appellee alleged in paragraph VI that a part of the cargo handling gear of the vessel "suddenly parted" and that a piece of gear fell and struck him, causing the alleged injuries (R. 9).

While Appellee alleged in his original complaint that he was a "foreman of longshoremen" and that his employer, Olympic Steamship Co., Inc., was an independent contractor "having complete control and supervision of operations pertaining to the loading and discharge of cargo" from the SS P&T ADVENTURER (paragraphs IV and III of complaint R. 8), he testified at the trial that he was working as a "dock foreman" (R. 309) and that his employer, Olympic Steamship Co., Inc., was not doing the stevedoring work of loading or discharging cargo from the vessel (R. 310). It was established by paragraph V of the Admitted Facts in the Pre-Trial Order (R. 17) that his employer, Olympic Steamship Co., Inc., was the operator of Pier 48 and was engaged only in "moving of cargo from ship's side to place of rest on dock" (R. 17). In paragraph VI of the Pre-Trial Order, it was established that Appellee was "a foreman over other shoreside workmen employed by Olympic Steamship Co., Inc., in handling said cargo on its said Pier 48" (R. 18).

By paragraph IV of the Admitted Facts in the Pre-Trial Order, it was established that another independent contractor, Seattle Stevedore Co., had "complete control and supervision of all operations pertaining to the discharge of cargo from the holds of Appellee's said vessel to the ship's side at Pier 48 * * * " (R. 17).

Seattle Stevedore Co. is not a party to this action, however its Stevedoring Contract with Appellant is in evidence as Exhibit A-9 (Text of exhibit at R. 463).

The original complaint (Paragraph VII) sought recovery only on the basis of alleged *unseaworthiness* of the vessel (R. 9, R. 323). Over objection of Appellant, the trial Court allowed Appellee to make a Trial Amendment (R. 13) adding charges of *negligence* to the allegations of Paragraph VII of the complaint (R. 14).

Appellant's Answers to the original and the amended complaints denied, *inter alia*, that Plaintiff (Appellee) was a foreman of longshoreman, denied that he was injured in the course of his duties and employment or that Appellee was obliged to traverse the deck of the vessel, and denied all allegations of unseaworthiness or negligence (R. 10, R. 15). An Affirmative Defense alleging contributory negligence of Plaintiff (Appellee) was set forth in the Answer which charged Appellee with "voluntarily placing himself or remaining in a dangerous position, in failing or omitting to take reasonable precautions for his own safety and in further negligent acts * * * " (R. 12).

In the Pre-Trial Order Appellant contended that the issues of fact for determination included the following:

- (1) Whether Appellee or his employer, Olympic Steamship Co., Inc., had any duties or obligations by contract or otherwise to perform any of the loading or discharging of cargo to or from the Appellant's vessel;

- (2) Whether Appellee as a dock foreman had any duties or legitimate business which required him to go aboard Appellant's vessel;
 - (3) Whether at the time of the accident Appellee was engaged in any of the cargo loading or discharging operations being conducted aboard the vessel;
 - (4) Whether the vessel was unseaworthy;
 - (5) Whether Appellant was negligent;
 - (6) Whether Appellee was contributorily negligent;
 - (7) The amount of any damages sustained by Appellee.
- (R. 19-22)

Appellant contended in the Pre-Trial Order that Issues of Law included:

- (1) What was the status of plaintiff Cordray as a dock foreman while aboard the SS "P&T ADVENTURER" with particular regard to whether he was a longshoreman or stevedore, a business guest-invitee, a mere licensee or a trespasser?
- (2) Was plaintiff Cordray within the class of workers to whom the defendant shipowner owed a duty to supply a seaworthy vessel?
- (3) Is plaintiff Cordray entitled to recover damages from the defendant even though he fails to prove that his injuries were proximately caused by any negligence of the defendant as alleged in the complaint?
- (4) Did defendant have a non-delegable duty to provide plaintiff Cordray with a safe place to work while plaintiff was aboard the SS "P&T ADVENTURER"? If so, can plaintiff recover damages

against defendant on proof of breach of any such alleged duty without proving negligence of the defendant? (R. 22-23)

Similar but separate Issues of Fact and of Law were submitted by Appellee and included in the Pre-Trial Order (R. 23-24).

At the close of plaintiff's (Appellee's) evidence, Appellant made and filed motion under F.R.C.P. 41(b) for dismissal based on the ground that upon the facts of record and upon the law applicable in this action, Appellee had shown no right to relief against Appellant (R. 25). At the same time, Appellant made and filed an alternative motion under F.R.C.P. 50 for a directed verdict against Appellee (R. 322), which was renewed at the close of all of the evidence (R. 391). The specific grounds for this motion were as follows:

"(1) That all such evidence fails to show that plaintiff is entitled to relief from defendant on the ground of *unseaworthiness*;

"(2) That all such evidence fails to show that plaintiff is entitled to relief against defendant on the basis of *negligence* or negligent failure to perform any duty owing from defendant to plaintiff;

"(3) That all such evidence fails to show any *unseaworthiness* of the vessel or *negligence* of defendant on the basis of which plaintiff would be entitled to recover against defendant." (Italics added) (R. 26, R. 322, R. 391)

All of the above motions were denied by the court (R. 327, R. 393) and in addition the trial Court denied separate motions presented by Appellant at the close of all the evidence to withdraw the issue of *seaworthi-*

ness and to withdraw the issue of *negligence* from the consideration of the jury (R. 322, R. 393).

The trial Court submitted the case to the jury on both the issue of *unseaworthiness* and the issue of *negligence* after Appellant had stated specific objections to instructions given by the court on both issues (R. 394, R. 421) and also specific objections to the refusal of the court to give to the jury certain instructions on both unseaworthiness and negligence which had been timely proposed in writing by Appellant (R. 27, R. 421-35).

The jury returned a verdict for \$28,750 in favor of Appellee and against Appellant (R. 33). Alternative post-trial motions for Judgment Notwithstanding the Verdict, and for a New Trial were timely served and filed by Appellant and thereafter denied by the trial Court (R. 38). This appeal followed (R. 42).

B. The Facts

Appellant operates a fleet of merchant cargo vessels engaged in various trades. Among these vessels is the SS "P&T ADVENTURER," which at the time of the accident in question, July 15, 1956, was engaged on a voyage in the intercoastal trade, calling at Seattle to discharge and load cargo (R. 356).

Appellee was a member of the Longshoremen's and Warehousemen's Union (R. 364-5). Since a previous industrial accident in 1949 requiring a back operation for repair of a herniated disc in 1940 (R. 19), he had confined his work activities to driving a truck (bull) (R. 315). Occasionally, he had worked as an extra dock

foreman for Olympic Steamship Co., Inc. (R. 314), a public terminal operator (R. 174), and he was so employed as a dock foreman for the terminal operator at Pier 48 at the time of the accident (R. 309).

Seattle Stevedore Co., as stevedore contractor for Appellant, was conducting all of the loading and discharging operations aboard the SS "P&T ADVENTURER" at the time of the accident and had its own foremen on the job aboard the vessel. These foremen supervised all of the longshoremen working on the vessel and the slingmen employed by Seattle Stevedore Co. who were working on the dock. The foremen also supervised the use of the ship's cargo handling gear by the longshoremen (R. 50, R. 71, R. 310). Appellee, as a dock foreman employed by the terminal operator, had nothing to do with the stevedoring-discharging operations being performed on the ship by the stevedore contractor (R. 364).

According to Appellee he went aboard the vessel on the early morning of July 15, 1956, shortly before the accident to ascertain from one of the stevedore foremen for Seattle Stevedore Co. what gangs of longshoremen were going to quit working on the vessel so that Appellee, as dock foreman, could plan for and arrange to release men working under him on the dock, whose further services would not be required (R. 295).

(While standing on the forward deck of the vessel near one of the stevedore foremen, Appellee was struck by a piece of a gantline wire strap or block which was part of the ship's gear (R. 54). Some time previously, this gear had been hung in place from the tip of one of

the booms at No. 2 hatch so that it would be available for use in the future in the event rain should necessitate rigging a hatch tent for protection of the cargo in the open hold (R. 97).

At the time of the accident longshoremen employed by Seattle Stevedore Co. were engaged in "winging in" or rounding in the booms and attached cargo handling gear (R. 84). There was *not supposed to be any strain* or stress on the hatch tent gantline and wire strap at that time, since no hatch tent was suspended from it and the lower end was *supposed to be slacked off* or unfastened at the point where it had been previously secured by longshoremen along the ship's rail or bulwarks (R. 84-5).

The wire strap at the upper end of this hatch tent suspension gear parted (R. 103-4). According to two of the mates of the vessel who testified as witnesses, this gear had been examined and serviced during the west-bound intercoastal voyage within a few weeks prior to the accident and it had not been used extensively since that time (R. 98, R. 378-9). Their examination of the recovered portion of the wire strap after the accident indicated that it was still in good condition and showed evidence that it had parted under unusual and excessive strain (R. 104, R. 370-1) as demonstrated by the frayed and unwound strands of the strap. Pictures obtained of the broken strap one day after the accident are in evidence and reproduced in the transcript (R. 460-1).

III.

SPECIFICATION OF ERRORS

1. The trial Court erred in not granting Appellant's motion under F.R.C.P. 50 for a Directed Verdict against plaintiff (Appellee), which motion was based upon the failure of Appellee to prove that he was within the class of workers entitled to recover damages from Appellant as shipowner, either on the ground of *unseaworthiness* or on the ground of *negligence* to an invitee or business guest (R. 26, R. 322, R. 391, R. 434).

2. The trial Court erred in not granting Appellant's separate motions to withdraw the issue of *unseaworthiness* and to withdraw the issue of *negligence* from the consideration of the jury, which motions were based upon failure of Appellee to prove that he was within the class of workers entitled to recover damages from a shipowner on the ground of *unseaworthiness* or on the ground of *negligence* to an invitee or business guest (R. 322, R. 392).

Note: Due to the length of the Instructions in the following Specifications of Error, and the length of the Exceptions taken by counsel for Appellant to the giving and refusal of such instructions, Appellant, after consulting with the Clerk of this Court, has set out the full text of such Instructions and the Exceptions in Appendix I and will refer to the same herein by Appendix page number, it being understood that this will be accepted as a compliance with the requirements of Rule 18(b) of this Court.

3. The trial Court erred in instructing the jury on *unseaworthiness* by its use of the term "cargo unloading longshoreman and his foreman" (R. 402-3) and the later use of the terms "cargo discharge arrangements"

and “cargo work” with respect to the dock handling operations, to which instruction Appellant duly excepted (R. 421-22). (For full text of Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

4. The trial Court erred in instructing the jury on *unseaworthiness* (R. 437) by directing the jury that “employees of each of such contractors” had a right to go aboard the vessel in connection with the performance of their work in “discharging said cargo from the vessel,” to which instruction (as revised by the trial Court) Appellant duly excepted (R. 423, R. 425, R. 428). (For full text of Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

5. The trial Court erred in instructing the jury on *unseaworthiness* (R. 404) by its reference to Appellee as a “foreman of the dock-working longshoremen assisting on the dock in the discharge of the vessel’s cargo,” to which instruction Appellant duly excepted (R. 428). (For full text of Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

6. The trial Court erred in instructing the jury on *unseaworthiness* (R. 405) by reason of its failure to include in said instruction appropriate language to enable the jury to determine as a fact the status of the plaintiff while aboard the ship, to which instruction Appellant duly excepted (R. 432). (For full text of Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

7. The trial Court erred by its refusal to give Appellant’s proposed Instruction No. 4 on *unseaworthiness* (R. 27-8) which included necessary language to deter-

mine the status of Appellee, to which refusal to instruct Appellee duly excepted (R. 432). (For full text of proposed Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

8. The trial Court erred by its refusal to give Appellant's proposed Instruction No. 7 on *negligence* (R. 29) which included legal definitions of "invitee" and "licensee," to which refusal to instruct Appellant duly excepted (R. 433). (For full text of proposed Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

9. The trial Court erred in its refusal to give Appellant's proposed Instruction No. 15 (R. 30-32) regarding damages and contributory negligence which included necessary language to enable determination by the jury as to Appellee's status aboard the vessel, either on the *unseaworthiness* or *negligence* grounds, to which refusal to instruct Appellant duly excepted (R. 433). (For full text of proposed Instruction and of Exceptions taken thereto, see Appendix I, page 47.)

10. The trial Court erred in its refusal to give Special Interrogatories to the jury as proposed by Appellant (R. 32-3) which would have enabled determination of whether the jury found liability based on *unseaworthiness* or *negligence*, or both, together with contributory negligence, to which refusal Appellant duly excepted (R. 435). (For full text of proposed Special Interrogatories and Exceptions taken thereto, see Appendix I, page 47.)

11. The trial Court erred by its denial (R. 38) of Appellant's Motion for Judgment Notwithstanding the

Verdict upon the following separate and alternative grounds:

“1. That all such evidence fails to show that plaintiff is entitled to relief from defendant on the ground of *unseaworthiness*;

“2. That all such evidence fails to show that plaintiff is entitled to relief against defendant on the basis of *negligence* or negligent failure to perform any duty owing from defendant to plaintiff;

“3. That all such evidence fails to show any *unseaworthiness* of the vessel or *negligence* of defendant on the basis of which plaintiff would be entitled to recover against defendant.” (Italics added) (R. 37)

12. The trial Court erred by its denial of Appellant’s Motion for New Trial based upon errors of law with respect to the improper instructions given and as to its refusal to give certain instructions proposed by Appellant as described in Specifications of Error No. 4 through No. 10 as set forth hereinabove (R. 34-5, R. 38).

13. The trial Court erred by its denial (R. 38) of Appellant’s Motion for New Trial based on the following grounds:

“3. That the damages awarded plaintiff by the verdict of the jury are excessive and are entirely unsupported as to amount by the undisputed evidence presented in the case;

“4. That the damages awarded plaintiff by the verdict of the jury are so grossly excessive as to unmistakably indicate that the amount of the verdict was the result of passion and prejudice by the jury.” (R. 35)

14. The trial Court erred by its denial (R. 38) of

Appellant's Motion for New Trial based on the following ground:

"5. Abuse of discretion and error of law by the Court in submitting to the jury general form of verdict without Special Interrogatories requested in writing by defendant thereby rendering it impossible to determine whether the verdict for plaintiff was found by the jury on alleged unseaworthiness or alleged negligence, adversely and prejudicially affecting defendant's rights to preserve these questions for further consideration if an appeal is taken." (R. 35)

Errors of Trial Court Summarized

Specifications numbered 1, 2, 3, 4, 5, 6, 7, 9, 11 and 12 deal in whole or in part with the issue of *seaworthiness or unseaworthiness* and whether Appellee was within the class of workers entitled to recover damages on this theory for injuries sustained while aboard a vessel. They will be discussed under Heading A in the Argument.

Specifications number 1, 2, 8, 9, 11 and 12 deal in whole or in part with the issue of *negligence* and whether Appellee was an invitee, a licensee or a mere trespasser, as related to the extent of duty owed by Appellant to protect Appellee from injuries while aboard the vessel. They will be discussed together under Heading B in the Argument.

Specification No. 13 deals with the amount of the verdict (R. 33) and Appellant's contention that it is unsupported by the evidence, grossly excessive and the result of passion and prejudice. It will be discussed under Heading C of Argument.

Specifications numbered 10 and 14 deal with Appellant's claim of abuse of discretion and error by the trial Court in refusing to submit Special Interrogatories to the jury to enable determination of the jury findings on the separate issues of *unseaworthiness* and *negligence*. They will be discussed under Heading D of Argument.

IV.

ARGUMENT

Summary of Argument

Under the facts established by the evidence admitted during the trial of this cause, and the law applicable to such facts, Appellant submits that:

A. A dock foreman (such as Appellee), employed by a terminal operator engaged in moving cargo across the dock after its discharge from a vessel by another company employed by the shipowner as an independent stevedore contractor, who is injured while temporarily aboard the vessel, is not within the classes of persons entitled to recover for his injuries from the vessel owner on the basis of *unseaworthiness*.

B. A dock foreman (such as Appellee), whose duties and responsibilities only relate to the custody and handling of cargo after it has been discharged from a vessel by a stevedore contractor, is not an *invitee* but only a *licensee* while briefly aboard the vessel to secure information as to the stevedore's plans for discharge of the cargo, which information might be useful to the dock foreman and the terminal operator by whom he was employed. Hence, as to the cause of action of Ap-

pellee based on *negligence*, the shipowner (such as Appellant) did not owe the dock foreman a duty to inspect and locate unsafe conditions or defective equipment but only to warn such a licensee of known dangers and perils and to refrain from wantonly or wilfully injuring him.

C. The verdict of \$28,750, considering all of the evidence, was so grossly excessive or monstrous as to unmistakably show passion and prejudice of the jury.

D. The trial Court should have submitted Special Interrogatories to the jury to enable ascertainment of whether the verdict for plaintiff was rested upon findings of unseaworthiness, negligence, or both.

IV.

A. Warranty of Seaworthiness Does Not Extend to Dock Foremen

(1.) Origin and Recent Extension of Seaworthiness Doctrine

Since the case of *The Osceola* (1903) 189 U.S. 158, 47 L.Ed. 760, courts in the United States have recognized that a *seaman* is entitled to recover damages for injuries caused by the unseaworthiness of the vessel upon which he is serving or of the appurtenances of the vessel.

In 1946 the Supreme Court of the United States extended this doctrine to allow *longshoremen* engaged in loading or unloading work on a ship to recover damages for injuries caused by unseaworthiness. *Seas Shipping Co. Inc. v. Sieracki*, 328 U.S. 85, 90 L.Ed. 1099. This extension was predicated upon the somewhat

questionable assumption by the Supreme Court that longshoremen were "doing a seaman's work and incurring a seaman's hazards," when engaged in loading or discharging cargo to or from a vessel, and hence that longshoremen should be entitled to the same protection from unseaworthiness that had previously been provided for seamen. *The Law of Admiralty*, Gilmore & Black (1957) p. 362.

In 1954 the Supreme Court of the United States extended the applicability of the doctrine of unseaworthiness to include a shore side *carpenter* injured while aboard a vessel for the purpose of repairing the grain trimming facilities to enable the ship to resume loading its cargo. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 98 L.Ed. 143. In the *Hawn* case, the Supreme Court emphasized that the test was "the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness." 346 U.S. 413, 98 L.Ed. 152.

In each of the above cases, the rationale underlying the extension of the warranty of seaworthiness to any particular class or type of shore side worker was that they were engaged in the "service" of the ship and doing a "seaman's work," or work that had been historically and traditionally performed by seamen.

(2.) Limitations on Extension Seaworthiness Doctrine

In 1956 this Court applied basically the same rationale and test as in the above cases to find that an *employee of a shipyard* injured by the operation of a shipyard grinding machine in use aboard a vessel was not doing the type of work traditionally done by a seaman

since "Not all repairs are 'ship's work,' to be performed, historically or currently, by the crew." *Berryhill v. Pacific Far East Line* (CA 9th, 1956) 238 F.2d 385, 387. Certiorari was denied by the United States Supreme Court 354 U.S. 938, 1 L.Ed.2d 1537.

The decision of this Court in limiting the extension and application of the doctrine of unseaworthiness has been followed in four more recent cases. *Raidy v. U. S.* (D. Md. 1957) 153 F.Supp. 777, where the court held that a *ship-fitter* working on an inactive dredge in a shipyard for major repairs and conversion was not entitled to recover on the basis of unseaworthiness. In *Berge v. National Bulk Carriers, Inc.* (CA 2) 251 F.2d 717, decided January 10, 1958, the Court of Appeals for the Second Circuit affirmed the trial court's holding that a shipyard *rigger* injured aboard a vessel while employed by a contractor engaged in extensive rebuilding of a ship was not entitled to recover on the basis of a warranty of seaworthiness.

To the same effect, is *Filipek v. Moore-McCormack Lines* (ED NY 1957) 156 F.Supp. 854, where the trial court held that a *rigger* employed by a shore side company to test the ship's cargo handling gear was not doing a seaman's work and not entitled to the warranty of seaworthiness.

In *McDaniel v. Lisholt* (SD NY 1957) 155 F.Supp. 619 a shore side *fireman* had been ordered to remain aboard a ship to check for hidden fires or renewal of fires after a hold fire had been extinguished upon arrival in port. The court held that the fireman was not entitled to recover on the basis of a warranty of sea-

worthiness for injuries sustained in an explosion which occurred in the refrigeration system as a result of the earlier fire.

A contrary result to the *Berge* case, *supra*, seems to have been reached by the Court of Appeals for the Second Circuit in *Halecki v. United N.Y.&N.J.S.H.P. Association* (CA 2, 1958) 251 F.2d 708, where the same Court, and the same panel on the Court, which decided the *Berge* case ruled the same day that an electrician employed by a shore company who was engaged in cleaning with carbon tetrachloride the generators of an inactive (non-crewed) pilot boat in a shipyard for overhaul and repairs was doing a seaman's work and his personal representative could recover for his death caused by unseaworthy conditions aboard the vessel.

In Appendix II to this brief, we have tabulated decisions from various federal courts where a recovery based on the claim of a warranty of seaworthiness has been denied because the courts have found that the particular worker was not performing the type of work, or was not within the class of workers, entitled to a seaman's warranty of seaworthiness. Throughout all these cases, there appears in one form or another the test which we submit is best expressed in the following terms:

“The test then is not the name given to plaintiff's calling or trade but the nature of his work
* * * ”

Berge v. National Bulk Carriers, Inc., 148 F. Supp. 608, 610 (Aff'd by CA 2) 251 F.2d 717.

“ * * * unless libellant can show that he was performing some job that is or has been a function of the ship's crew, respondent's exceptions must be sustained.”

Tarkington v. American President Lines Ltd.
(ND Cal) 1955 AMC 114, 115 (involving a Customs officer injured while conducting an inspection on a vessel).

(3.) Factual Reasons and Contract-Tariff Provisions for Not Extending Warranty of Seaworthiness to Appellee

As used during the trial of this case and in other reported cases, the terms “stevedore” and “longshoreman” are usually regarded as synonymous (R. 310). In *The Owego* (WD Wash. ND, 1923) 292 Fed. 505, the court adopted the definition of the term “stevedore” from Bouvier's Law Dictionary as “a person employed in loading and unloading a vessel.” See also: *Zampiere v. William Spencer & Son Corp.*, 185 N.Y.S. 639, 640.

In this case, all of the duties and responsibilities of Appellee, and of his employer, related to the movement, handling and custody of the cargo on the dock after it had already been discharged from a vessel and landed on the dock by an entirely different contractor (R. 178-9, R. 181-2).

Seattle Terminals Tariff No. 100 (Exhibit 3), to which the employer of Appellee (R. 176, R. 354) and the Appellant as shipowner (See Item 20, Exhibit 3, R. 441, and Item 30, Exhibit 4, R. 446) had become par-

ties, defines the principal service rendered by the dock-terminal operator as follows:

“Item No. 420—Handling Defined

“Handling charge is the charge made against vessels, their owners, agents, or operators for *moving freight from end of ship's tackle on the wharf to first place of rest on the wharf*, or from first place of rest on the wharf to within reach of ship's tackle on the wharf. It includes ordinary sorting, breaking down and stacking on wharf.” (Italics for emphasis) (R. 443)

Appellee was not a seaman. He was not doing, or responsible for the supervision of, any work aboard the ship such as a seaman — or even a longshoreman — might do. He was not exposed to the hazards of the sea such as the rolling and pitching of a vessel, shipwreck, stranding, fire or disease, nor to the stern discipline of long term employment under shipping articles and penalties imposed on seamen for mutiny, desertion, unauthorized absence, insubordination, or refusal to work. Title 46 U.S. Code Ch. 18, §§564, 565, 576, 592, 595, 599, 655, 662, 701, 703, 704, 705.

On the contrary, Appellee was a shoreside or dock worker, who lived at home and was free to work or quit his waterfront employment at any time he chose to do so. He was provided by his shoreside employer with compensation benefits including hospitalization, medical attention and weekly payments while disabled as a result of on the job injuries (R. 18—Para. VIII). He had no work to perform aboard the vessel which was of any benefit to Appellant shipowner and he happened to

be temporarily aboard only to obtain information to aid him in conducting his shoreside duties (R. 295).

The reasons and rationale expressed in the *Sieracki* case for extending the doctrine of unseaworthiness to longshoremen *performing work aboard a vessel* are wholly absent in the present case. The reason for extending the doctrine of unseaworthiness to a shoreside carpenter in the *Hawn* case, namely that he had *work to do aboard the vessel* to enable it to continue loading a cargo of grain, is likewise entirely lacking in the present case.

(4.) Comparison and Distinctions Between Seaman-Ship Workers and Dock or Harborworkers

Notwithstanding the extreme solicitude with which courts have evaluated and established the rights of seamen, longshoremen and other harborworkers in recent years, we submit that the facts in this case represent a situation so extreme as to render completely illogical and unsound the attempt by the trial Court to apply the concept of a warranty of seaworthiness to Appellee.

In fact, Congress and state legislatures have maintained a sharp distinction between harborworkers and seamen by granting the former compensation benefits from their employers under the federal act, Title 33 U.S. Code §901, *et seq.*, or various state acts including the State of Washington, R.C.W. 51.12.100, *et seq.* In contrast, seamen are excluded from compensation act benefits, Title 33 U.S. Code §903(1), and are provided

with an entirely different remedy by means of an action for damages against their employer for negligence under the Jones Act, Title 46 U.S. Code §901, *et seq.*

While it is true that Appellee here might be in the Supreme Court created "twilight zone," *Davis v. Dept. of L. & I.* (Wash.) 317 U.S. 249, 87 L.Ed. 246, this is not a matter of concern to workers such as Appellee, who most certainly would be entitled to compensation benefits under either the federal or the state act and in fact may have a choice between the two acts in determining where such benefits should be obtained.

The "maritime but local" and "twilight zone" cases have produced a judicial determination on the most similar factual situation to this case with respect to the *status* of a dock worker injured while temporarily on a vessel. In *The Washington* (S.Ct. Cal.) 292 Pac. 120, 1930 AMC 1849, the decedent had been an "assistant wharfinger" at an Oakland dock whose duties were concerned with the care and custody of cargo placed on the dock, for loading to, or after discharge from, vessels. " * * * he took no part in the actual loading or unloading of vessels and exercised no control over persons engaged for that purpose." Occasionally he would go aboard a vessel to secure manifest papers "and thus facilitate the work of unloading." In deciding that the decedent was still subject to the California Workmen's Compensation Act although he was injured while temporarily aboard a vessel the court stated:

"Teahan was a land employee. His contract of employment was non-maritime and the services required of him were not maritime in character but, in the main, had to do solely with the custody and

protection of property placed on the dock. Here we have the deceased working for an employer whose business is on land and whose contract in its essential details was to be performed on land, temporarily boarding a vessel tied to a dock in order to procure its manifest papers, which, under the evidence, ordinarily would have been delivered to him on the dock by the captain of the vessel.

* * *

“Teahan was essentially a land employee engaged under a non-maritime contract.”

The Washington (S.Ct. Cal.) 292 Pac. 120, 1930 AMC 1849, 1851, 1853.

We submit that this Court should not permit the assimilation of *shoreside-dock workmen* such as Appellee into the maritime field of those entitled to a warranty of seaworthiness from the shipowner so as to create absolute liability of the shipowner to such workmen when injured while temporarily aboard a vessel for a purpose of their own and *not in connection with the loading or discharging operation* or in connection with any other work traditionally, historically, normally, presently or otherwise done by seamen.

To extend the doctrine as advocated by Appellee would mean to recognize that almost anyone, be he passenger, guest of a crewmember, cargo surveyor, shipper's representative, customs or immigration official, deliveryman, or any shipyard worker who happened to have a legitimate reason for being aboard a ship, would be entitled to the same warranty of seaworthiness as a seaman, or a longshoreman engaged in doing the “seaman's work” of loading or discharging a vessel.

The courts in this country, including the Supreme Court of the United States, have not gone this far. Thus in a recent case the Court of Appeals for the Second Circuit found that a visitor, who had been issued a pass to go aboard a vessel and was injured when he slipped on a loose stair carpet, was not entitled to recover on the basis of a claim of unseaworthiness. *Kermarec v. Compagnie Gen. Transatlantique* (CA 2-1957) 245 F.2d 175. The Court stated in part as follows:

“The high duty of care which the maritime law has required of shipowners with respect to seamen arises from necessities of the calling which provoke a solicitude for the seaman’s welfare. But the seaman’s visitor who attends at his own choice, for a purpose which is of no benefit to the ship, is on sufferance.

“A cause of action for unseaworthiness, while available to seamen and stevedores, is not available to *Kermarec* who was nothing more than a licensee. *The Osceola*, 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760; *Seas Shipping Co. v. Sieracki*, 1945, 326 U.S. 700, 66 S.Ct. 58, 90 L.Ed. 413; *Pope & Talbot v. Hawn*, *supra*. *Kermarec* did not make any contribution to the ship’s safety, preservation or progress; he did not submit his life and safety to the ship as a seaman does; he did not load her for a voyage as a stevedore does; consequently he does not have any right to recover for unseaworthiness.”

Kermarec v. Compagnie Generale Transatlantique (CA2-1957) 245 F.2d 175, 177, 178.

(5.) Argument on Specification of Errors No. 1 and No. 2—Why Appellant’s Trial Motions Should Have Been Granted

Assuming, *arguendo*, the soundness of the above

propositions, we turn now to the claimed error of the trial Court with respect to the cause of action based on alleged *unseaworthiness*.

By the motions at the close of all of the evidence, Appellant sought to have this *unseaworthiness* cause of action dismissed or withdrawn from the consideration of the jury (Specification of Errors No. 1 and 2). We submit that it was reversible error not to grant such motions as there was not a scintilla of evidence that Appellee had any duty or responsibility in connection with the loading or discharge of cargo from the vessel, and in fact, all of the affirmative testimony is to the contrary (R. 323, 391-2). All of such stevedoring-longshoring work was being performed by another company, not the employer of Appellee, and by longshoremen employed by the other company who were not under the control, supervision or direction of Appellee (R. 310, R. 330-1).

While it is true that Appellee claims to have had some legitimate business aboard the vessel (R. 295-6), that does not automatically entitle him to the benefit of a seaman's warranty of seaworthiness. Many workers may have business to conduct aboard a vessel, as mentioned earlier as to deliverymen, cargo surveyors, ship surveyors, inspectors and government officials (R. 79-80; R. 355). But such persons are not entitled to a warranty of seaworthiness (See Appendix II).

(6.) Argument on Error in Instructions on Unseaworthiness—Specifications Nos. 3, 4, 5, 6, 7, 9 and 15

Having erroneously denied Appellant's Motions to withdraw the *unseaworthiness* issue from the jury, we

contend that the trial Court next committed reversible error by its failure to properly submit the *unseaworthiness* claim as an issue of fact for jury determination.

For example, in one of its first instructions on the *unseaworthiness* issue, the trial Court, over objection of Appellant, characterized the Appellee as “a cargo unloading longshoreman and his foreman” (R. 402) and then proceeded to state that:

“Under the admiralty law, *which applies in this case*, a longshoreman or his *foreman* assigned in unloading cargo * * * ” (R. 403) (Italics added)

We submit that this amounted in effect to a *direction* by the trial Court to the jury to find for Appellee on the unseaworthiness count. It cannot be argued with any degree of validity or merit that the next paragraph of the instruction preserved for jury determination the issue of fact as to whether Appellee was within the category of seamen-longshoremen who are entitled under the present decisional law to recover on the basis of unseaworthiness (Specification of Error No. 3 and text of Instruction and Exception in Appendix I, p. 47.)

Similarly in a following instruction the trial Court *told* the jury that Appellee “had the right to go upon such places under (Appellant’s) control as were reasonably necessary * * * ” without leaving it to the jury to find upon this important issue of fact (Specification of Errors No. 4, R. 425, 428, 437, and text of Instruction and Exception in Appendix I, p. 47.)

Again, in a later instruction, the trial court improperly characterized Appellee as a “foreman of *dock-working longshoremen assisting on the dock in the dis-*

charge of the vessel's cargo'' (R. 404). Appellant duly excepted to such *direction* by the Court on an important factual issue as to the status of Appellee and as to the nature of the work in which he was engaged (R. 428, Specification of Errors No. 5 and text of Instruction and Exception in Appendix I, p. 47.)

In defining *seaworthiness* as related to Appellee, the trial Court failed to connect or tie up such definitions and statements with the factual issue as to the status of Appellee (Specification of Errors No. 6, R. 405, R. 432, and text of Instruction and Exception in Appendix I, p. 47). Appellant proposed an alternative instruction (R. 27-8) which, if given, would have overcome the deficiency (Specification of Errors No. 7 and text of proposed Instruction and Exception in Appendix I, p. 47).

It will be noted in Appellant's Proposed Instruction No. 4 and Proposed Instruction No. 15 (text of Instruction and Exception at Appendix I, p. 47) which the trial Court refused, that it was *left to the jury* to determine as a factual issue whether Appellee "was performing work at the time of the accident which would normally be performed by members of the crew." We submit that this is the recognized and proper test to determine whether an injured person is entitled to recover for breach of a warranty of seaworthiness. We also submit that the inclusion of such proposed language in the Court's instructions might have produced an entirely different verdict from the jury, and that the refusal of the trial court to instruct as requested by appellant was a prejudicial error necessitating reversal on this appeal (Specification of Errors No. 7 and No. 9).

Looking cumulatively at all of the instructions given by the trial Court on the issue of *unseaworthiness* it can hardly be denied that they amount *in toto* to a direction by the Court in favor of Appellee on this vital issue. This perhaps rendered unnecessary a determination by the jury on the second issue of *negligence*, although it will never be possible to determine this as the Court arbitrarily declined to submit Special Interrogatories such as proposed by Appellant (R. 32-3, Specification of Errors No. 12 and No. 14 and text of proposed Special Interrogatories and Exception in Appendix I, p. 47), which would have enabled a segregation of jury findings between unseaworthiness and negligence. Appellant duly objected to this refusal (R. 435).

IV.

B. A Dock Foreman Is No More Than a Licensee, and Not an Invitee, When Aboard a Vessel in Connection With Dock Cargo Handling Work

All of the evidence at the trial plainly showed, without exception, that Appellee's duties related only to handling of the cargo on the dock. He had no responsibility for, or supervision of, "cargo loading or discharging" on the vessel (R. 182, R. 184, R. 242, R. 310). It is extremely doubtful whether Appellee's duties on the dock required him to go aboard the vessel (R. 330-32). Even if they did, this would not automatically make him an "invitee" while aboard.

(1.) Classes of Persons Held by Courts To Be Mere Licensees While Aboard Ships

Many types of persons going aboard a vessel have been held to attain the status of only a "licensee."

- Swanson v. Luckenbach SS Co.* (CA 9-1927) 17 F.2d 735—employee of consignor;
- Silverado SS Co. v. Prendergast* (CA 9-1929) 31 F.2d 225—friend of master;
- The Sudbury* (D.Ore. 1926) 14 F.2d 533—employee of consignee;
- Kermarec v. Compagnie Gen. Transatlantique* (CA 2-1957) 245 F.2d 175—visitor aboard a vessel;
- Apostolou v. Eugenia Chandris* (D.Ore. 1938) 1938 AMC 995—social guest;
- Kosba v. Bank Line* (D.Md. 1931) 46 F.2d 119—deliveryman;
- The Germania*, 10 Fed. Cas. 255, No. 5360—workman employed by cargo owner to bag a grain cargo while aboard a ship;
- Lauchert v. American SS Co.* (WDNY-1946) 65 F.Supp. 703—seaman passing over one vessel to reach his own vessel;
- Aho v. Jacobsen* (CA 1-1957) 249 F.2d 309—seaman crossing one vessel to board his vessel moored outboard therefrom;
- McDaniel v. Lisholt* (SDNY-1957) 155 F. Supp. 619—shoreside fireman maintaining firewatch on vessel after hold fire extinguished.

(2.) Limited Duty Owed by Ship-Operator to Licensees

The rule as to the duty owed by a shipowner to such licensees has been stated as follows:

“ * * * the libelant, being a mere licensee going on this boat in his own interest or that of his em-

ployer, the owner of the boat owed him no duty as to its condition, save that it should not knowingly let him run upon a hidden peril, or wantonly, recklessly, or willfully cause him harm.” (Italics for emphasis)

The Sudbury (D.Ore. 1926) 14 F.2d 533-34.

Otherwise stated:

“The licensee enters upon the premises at his own risk * * *.”

Lauchert v. American SS Co. (W.D.N.Y. 1946) 65 F.Supp. 703, 710.

“The general rule is that the shipowner shall not wilfully or wantonly injure a licensee, or expose him to hidden perils or fail to use due care to prevent injury to him after discovering that he is in danger.”

Kermarec v. Compagnie Gen. Transatlantique
(CA 2-1957) 245 F.2d 175, 178.

See also:

Restatement of Torts, §343, Comment (a).

(3.) Argument on Error in Instructions on Negligence —Invitee or Licensee—Specification of Errors Nos. 8 and 9

Before the jury in this case could determine the factual issue of whether Appellant was negligent, it was necessary for the jury *to be instructed* as to the legal *difference* between an “invitee” and a “licensee,” so that the jury could make a *preliminary factual determination* as to the *status of Appellee*. This the trial Court did not permit the jury to do, by reason of its refusal to give Appellant’s Proposed Instruction No.

7 (Specification of Error No. 8, R. 29, R. 433 and text of proposed Instruction and Exception in Appendix I, p. 47).

The instruction on *negligence* as given by the trial Court (R. 406-8) made absolutely no reference to *invitees and licensees* or to the difference in standard of care owed to the two classes of persons. Here again, in its instruction on *negligence*, as was the case in earlier instructions on *unseaworthiness*, the trial Court referred generally and casually to "longshoremen and seamen" (R. 407) without submitting to the jury by appropriate instruction the question as to whether Appellee was an "invitee" or "licensee" while aboard the vessel (R. 433).

The terms "longshoreman" or "stevedore" as sometimes used by witnesses during the trial hold no magic.

"The test then is not the name given to plaintiff's calling or trade but the *nature of his work*, and viewed in this light it is abundantly clear that plaintiff was not performing usual seaman's work." (Italics added)

Berge v. National Bulk Carriers, Inc. (SDNY-1957) 148 F.Supp. 608, 610 (aff'd by CA 2-1958) 251 F.2d 717.

Hence, the mere fact that Appellee stated that he was a "longshoreman" (R. 288) or the fact that men working under him were members of the Longshoremen's and Warehousemen's Union (R. 228-9; R. 364-5) should not determine the *issue of fact* as to whether Appellee was an "invitee" or a "licensee" while aboard the ship. The record is replete with uncontradicted testimony that

Appellee was aboard the ship for a purpose of his own and not in connection with any work to be performed by him aboard the ship nor was he aboard to perform any duty in connection with the discharge of cargo from the ship (R. 73-6, R. 180-84, R. 222-3, R. 238, R. 309-10, R. 330-33, R. 350-51, R. 364-5). Appellant was entitled to have the jury weigh this evidence and determine the status of Appellee under appropriate instructions, but this was not possible under the instructions as given by the trial Court on negligence.

(4.) Argument on Loading or Discharging Operations and Contract-Tariff Provisions

The trial Court seems to have attached great significance to the fact that evidence showed that Appellee had a duty to the shippers of cargo on this vessel not only to transport and discharge the cargo to the dock at Seattle, but to move the cargo from the end of ship's tackle on the dock to its place of rest in the terminal warehouse at Pier 48 (R. 324-6). Because Appellant had such an obligation, the trial Court held that the "handling" of such cargo on the dock, under the supervision of Appellee, was part of the "cargo unloading operations of the vessel" (R. 326).

We submit that the fallacy of this reasoning is obvious, but it may be further demonstrated by the uncontroverted evidence that at the time of the subject accident the Seattle Stevedoring Co. performed *all* of the work at Seattle of *loading* and *discharging* vessels owned or operated by Appellant under a written "Stevedoring Contract" in evidence as Exhibit A-9 (R. 463). Furthermore, all witnesses testified without ex-

ception that Seattle Stevedoring Co. and its employees actually did all of the loading and discharging work, and were doing so at the time of this accident (R. 71-9, R. 91, R. 102-3, R. 174-84, R. 200-01, R. 222-3, R. 242, R. 293, R. 309-10, R. 330-33, R. 358, R. 364).

The operation of “discharging” (and loading) of vessels was being performed by one contractor under one contract (Exhibit A-9, R. 463) while the operation of “handling” the cargo on the dock *after its discharge* was being performed by a separate contractor under a different contract or public terminal tariff (Exhibits 3, 4, R. 443, R. 445, R. 174). The *handling* operation followed the *discharging* operation, but they were not the same. The nature and legal effect of accessorial services such as “handling” and “wharfage” and their inclusion in rates charged and collected by carriers was thoroughly considered by the U.S. Supreme Court in *United States v. I.C.C.* (1956) 352 U.S. 158, 162-3, 1 L.Ed. 211, 215.

The initial error of the trial Court with regard to the *negligence* issue was its failure to grant Appellant’s motions to dismiss this cause of action or to withdraw this issue of negligence from consideration of the jury or to direct a verdict for Appellant on the charge of negligence (Specification of Errors Nos. 1 and 2; R. 322, R. 393).

In *Swanson v. Luckenbach SS Co.* (CA 9-1927) 17 F.2d 735, this Court had before it for review on appeal a strikingly similar factual situation. The plaintiff was an employee of a shipper of lumber being loaded aboard a vessel. The shipper had directed plaintiff to

see that the lumber was properly handled from the mill to the dock and to observe whether any of the lumber was damaged while being loaded and stowed aboard the vessel; also, that it was correctly segregated and marked for various consignees when stowed. Plaintiff was injured while aboard the vessel in the course of these duties and sued the shipowner for damages on account of alleged negligence of the persons operating the ship's cargo handling gear.

The trial Court directed a verdict for the defendant on the basis of its finding that plaintiff was a mere licensee while aboard the vessel. On appeal this Court affirmed, stating:

“Without waiting for the assignment by defendant of other grounds, the lower court directed a verdict upon the theory that, in coming on the ship, plaintiff was not an invitee, but only a licensee.

* * *

“We are inclined to agree with the lower court that technically plaintiff was a licensee, rather than an invitee. But back of mere technical terms our real concern is with defendant's obligations. Clearly we think there was no duty on its part to adjust the mode of carrying on its work to suit the plaintiff's convenience, or, without regard to other considerations, to adopt a plan attended with the least danger to him at all places where he might choose to go. * * * In going forward at the time upon an errand in which the defendant was in no wise interested, he assumed the risk of perils obviously incident to the movement of ponderous timbers swinging at the end of a long fall line.”

Swanson v. Luckenbach SS Co. (CA 9-1927)
17 F.2d 735, 736.

Certiorari was denied on this case by the United States Supreme Court at 275 U.S. 534, 72 L.Ed. 412.

This Court again recognized the limitations as to the right of recovery by a licensee in *Silverado SS Co. v. Prendergast* (CA 9-1929) 31 F.2d 225, a case involving a social guest of the master who was injured by falling into an open hatch while aboard a vessel. The opinion of this Court emphasizes that the presence of the guest had no relation to the shipowner's business.

(5.) Argument on Issue of Custom or Practice of Dock Foreman Going Aboard Ship

Appellee herein attempted to raise his status from that of a licensee to that of an invitee by offering evidence tending to show a custom or practice at the port of Seattle for dock foremen to go aboard the vessel during the course of loading or discharging operations (R. 52-3, R. 192, R. 239-40). A similar practice was likewise urged in the *Swanson* case, *supra*, and this Court disposed of it by stating:

“Such custom or practice as the evidence here tends to show is not thought to be highly material. Defendant does not contend that plaintiff was a trespasser, and a mere license, as well as an invitation, may be implied from custom.

* * *

“Even though we were to take the view that permission to be on board the ship was for a purpose in which the defendant was indirectly interested, surely it was not with the understanding that, upon going into the zone of an operation necessarily attended with danger, he could fail to exercise reasonable care to protect himself against injury.”

Swanson v. Luckenbach SS Co. (CA 9-1927)
17 F.2d 735, 736.

The refusal of the trial Court to instruct on the difference between "invitee" and "licensee" status is perhaps an even more serious error which requires reversal by this Court (Specification of Error No. 8). Appellant specifically excepted to the omission of such essentials from the Court's instructions on negligence (R. 432-33 and text of Instruction and Exception in Appendix I, p. 47) and offered a proposed instruction covering these essentials which the Court refused to give (R. 29 and text of proposed Instruction and Exception in Appendix I, p. 47). The error was again called to the attention of the trial Court on Motion for New Trial (R. 34-5) and the trial Court again rejected Appellant's contention (R. 38). Parenthetically, we should like to advise this Court that the *Swanson v. Luckenbach* case, *supra*, and other authorities were cited to the trial Court on this point in our Memorandum of Authorities submitted during the trial of the case and were urged again to the trial Court as controlling on this point during argument of post-trial Motions.

D. Excessive Verdict

Appellee walked off the vessel and was driven to a Seattle hospital by a co-worker immediately after the accident (R. 296-7). He was discharged from the hospital two days later (on July 17, 1956) and thereafter rested and recuperated at home (R. 297).

He was rehospitalized on August 28, 1956, by another doctor that he had consulted sometime after the acci-

dent. He was discharged again from the hospital on September 15, 1956, which was 18 days after admission (R. 151, R. 298).

Meanwhile he had worked at least two days as a longshoreman in July, 1956, before the second hospitalization (R. 298). He resumed work after the second hospitalization on October 22, 1956 (R. 298).

The earnings of Appellee from his work as a longshoreman, bull driver and dock foreman are set forth for several previous years in Exhibit A-6 (text at R. 459) and, after the accident, for the first nine months of 1957 in Exhibit A-5 (text at R. 457). These show an average annual earnings for the 5 full calendar years prior to the accident of \$5557.37 per year or over \$463 per month. After the accident, in the first nine months of 1957 Appellee earned an average of over \$541 per month (R. 317).

Solely on the basis of Appellee's own earnings records and his testimony concerning them, it would appear that he is now earning and is capable of earning in the future, about \$78 a month more than he was actually earning per month before the accident. Appellee had worked as a longshoreman as recently as two days before the start of the trial in November, 1957 (R. 318).

Appellant's examining physician, Dr. James Miller, who is an orthopedic specialist, felt that "he could continue at his regular job and was not in need of further treatment" (R. 278), while Appellee's physician, Dr. Bernard Gray, felt that he was not physically able to do the ordinary work of a longshoreman on a steady, full-time basis (R. 160).

In connection with Dr. Gray's above-mentioned opinion as to future limitations on Appellee's ability to work, it should be noted that Appellee had sustained a prior industrial injury to his low back in 1949 resulting in a fusion operation in 1950 for a herniated disc (R. 19, R. 290, R. 312). After that date, and during a period of about six years prior to the present accident in 1956, Appellee had been bothered by back pain and had not undertaken to do the heavy work of a longshoreman. By his own testimony Appellee conceded that due to the former accident his waterfront work had been confined for six years before this accident to working as a truck driver, a dock foreman and to such other work as did not involve heavy lifting (R. 312-13).

These earnings records and the above testimony as to prior injury and pre-existing disability demonstrate and prove without dispute that any loss of earnings or of earning power sustained by Appellee as a result of this accident was only temporary and of short duration during the 5 or 6 months immediately following the accident. A liberal calculation of such loss of earnings would not exceed \$750.

The only other special damages proved by Appellee were the following bills:

Exh. 1—Providence

Hospital	\$585.75	(R. 87)
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Exh. 2—Swedish

Hospital	96.45	(R. 88)
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682.20

Dr. Bernard Gray.....	544.00	(R. 162)
		\$1226.20

No effort was made by Appellee to prove any estimated future medical expenses, if such should be incurred.

Thus, the grand total of the proved special damages is \$1976, or let us say, not to exceed \$2000. Of the total of \$28,750 allowed by the jury verdict more than \$26,000 must represent allowance for pain and suffering or general damage.

It may be true that this appellate Court has adopted and followed a rather strict and severe rule with respect to the right to review and interfere with the discretion of a jury to determine and fix the amount of damages awarded in personal injury cases. *Pacific Greyhound Lines v. Rumeh* (CA 9-1949) 178 F.2d 652, 654. *Southern Pacific Co. v. Guthrie* (CA 9-1951) 186 F.2d 926.

This Court must recognize, however, that in a proper case, either the award by a jury, or the award by a trial judge in a non-jury case may be found improper. Thus, in *Cobb v. Lepisto* (CA 9-1925) 6 F.2d 128, this Court reversed a judgment based upon a \$6500 jury verdict in a case involving a miner's claim for services rendered, upon the ground that the amount of the jury award was "grossly excessive."

Within the last few months this Court has reversed a judgment in a seaman's action for personal injuries (non-jury case) on the ground of inconsistency between the findings of fact as to injury and the conclusion as to amount of damages. *Farley v. U. S.* (CA 9-Jan. 6, 1958) 252 F.2d 85. Surely, if such appellate review is presently recognized in non-jury cases, this Court must continue to have the power to review the award by a jury as in this case, and to determine whether the trial Court

erroneously refused to grant a new trial on the grounds of an excessive award of damages so gross as to indicate that it was the result of passion and prejudice of the jury (Specification of Error No. 13, R. 35).

It is submitted that passion and prejudice of the jury may be imputed from the size of the verdict. The amount awarded Appellee over and above his proved special damages is substantially more than Appellant should pay, assuming, *arguendo*, that liability has been validly established.

28 U.S. Code §2106 provides that this Court may:

“affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had *as may be just under the circumstances.*” (Italics for emphasis)

28 U.S. Code §2106.

We submit that it is incumbent upon this Court to perform its statutory duty by reviewing and correcting any error committed by the trial Court or the jury with respect to the amount of the verdict in this case.

The verdict must represent either an allowance for sympathy, an excessive figure based on prejudice against a corporate defendant, a misconception as to the ability of this defendant to pay, or a combination of such factors. Certainly there is no evidence in the record sufficient to justify the amount awarded Appellee by the jury in this case, or even closely approaching such a figure.

We therefore earnestly submit that should be fixed to be remitted from the condition for not requiring a new trial.

**E. Special Interrogatories Should Have
to the Jury to Enable Segregation
Unseaworthiness and Negligence on**

The importance of these Specifications 10 and No. 14. Full text of Special Interrogatories proposed and Exceptions to their refusal (see Appendix I, p. 47) has been briefly discussed earlier in connection with our concluding remarks on the *unseaworthiness* issue. The necessity of Special Interrogatories under the pleading rules on these issues in this case has been demonstrated by the submission of *unseaworthiness* and *negligence* issues were submitted to the jury by the trial court and further illustrated by the statement of the court in its appeals for the Eighth Circuit in reversal of the verdict entered on a jury verdict in a wrongful death case.

“Where several issues of fact are submitted to the jury and one of them is erroneously submitted over the objection of a defendant, if a verdict is returned against him, the court should have the verdict set aside and to have a new trial. This is because it is impossible to

the "sound discretion" of the trial judge, this recently recognized the importance and necessity of obtaining answers from the jury to special interrogatories in a negligence case. In *Union Pacific Railroad Co. v. Bridal Veil Lumber Co.* (CA 9-1955) 219 F.2d 100, the court states with respect to answers by the jury to Special Interrogatories:

"To this court, it seems that the disagreement of the jury on *one vital question* left a gap in the special verdict." (Italics for emphasis.)

Upon the basis of the failure of the jury to answer an answer to one of the special interrogatories, this Court reversed the judgment of the trial court and remanded the case for a new trial.

Following the same reasoning, we submit that in this case a new trial should be granted because of the refusal of the trial Court to submit proposed Special Interrogatories to the jury which would have enabled the jury to determine as to which of the two alleged possibilities were found proved. The importance of the segregation of the findings of the jury is inherent in the other issues as to unseaworthiness and negligence, and is emphasized by this appeal.

V.

CONCLUSION

United States Supreme Court to grant a petition for writ of certiorari, 354 U.S. 938, 1 L.Ed. 1537.

Recent cases cited from other Circuits in Appendix II give strength to the position taken by this Court in *Berryhill, supra*, that limitations must now be placed on the doctrine of absolute liability for unseaworthiness as already extended by the *Sieracki* and *Hawn* cases, *supra*.

Thus, in *Lee v. Pure Oil Co.* (CA 6-1955) 218 F.2d 711, the Sixth Circuit stated:

“To extend the doctrine of unseaworthiness to the circumstances of the present case would not only extend it well beyond the facts of the *Sieracki* case, but would stretch it almost beyond recognition. Here the deceased was not performing a ship’s service with the owner’s ‘consent or by his arrangement.’ He was at best a mere volunteer.”

Lee v. Pure Oil Co. (CA 6-1955) 218 F.2d 711, 713.

The Second Circuit, speaking through Judge Learned Hand in *Guerrini v. U. S.* (CA 2-1948) 167 F.2d 352, expressed its reluctance to further extend the warranty of seaworthiness beyond the extension by the Supreme Court in the *Sieracki* case as follows:

“ * * * Yet we should hesitate to read the decision as intended to extend the protection of what amounts to a warranty of seaworthiness to all workmen upon a ship, however casual their presence there, and however much their relation to the employer is unlike the early paternalistic status of master and crew, many of whose features have vestigially persisted to the present time. * * * ”

Guerrini v. U. S. (CA 2-1948) 167 F.2d 352,
354.

We submit that both on the issue of *seaworthiness* and the issue of *negligence* the trial Court misconstrued the applicable law and in addition made an unwarranted invasion of the province of the jury in determining factual issues. In addition, we contend that it committed an abuse of discretion in not submitting Special Interrogatories, and additional prejudicial error in not granting defendant relief from the excessive damages awarded by the jury verdict.

For each of the above reasons, Appellant submits that the judgment of the trial Court should be reversed.

Respectfully submitted,

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APPENDIX I

**Text of Instructions and Appellant's Exceptions to
Instructions Given and Refused as Mentioned in
the Specification of Errors**

NOTE: Italicized words in text of instructions identify insofar as possible the specific language to which exception was taken.

*Specification No. 3**Instruction:*

“By the admiralty law, which relates to ocean shipping activities and incidents connected therewith, the owner of a vessel is liable to indemnify a *cargo unloading longshoreman and his foreman* for injuries and damages proximately caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment. It is immaterial whether the shipowner knows of the dangerous and unseaworthy condition, because the shipowner owes the longshoreman a continuous duty to provide him a safe place in which to work. This duty cannot be delegated to anyone else.

“Under the admiralty law, which applies in this case, a *longshoreman or his foreman assigned in unloading cargo* from a ship does not assume the risk of an unsafe, improper and unseaworthy place to work. The shipowner is under a continuing, non-delegable duty to keep the ship and its appliances seaworthy, safe and in proper condition.

“Recovery on the ground of unseaworthiness is limited to seamen and others such as longshoremen performing work for the ship such as discharging cargo which historically and until recent times was done by members of the ship's crew.

“It was the duty of the defendant in its shipping contract with shippers to unload the cargo from the ship and store it on the dock in the warehouse on the dock. To perform this duty the defendant made *cargo discharge* arrangements resulting in two independent contracts with independent employees in *such cargo work*. One of the contractors, Seattle Stevedore Co., employed employees who unloaded the cargo from the ship on the outside dock platform under supervision of the other such contractor, Olympic Stevedore Co. The defendant moved the cargo onward from that platform to a place of rest on the dock floor inside the warehouse house.” (R. 402-3)

Exception:

“The particular language which the plaintiff objects to is the use of the phrase ‘longshoreman and his foreman.’ The defendant submits now, as it has earlier in the trial, that that is a factual issue as to the status of the plaintiff which should be left to the jury. The objection be expressed in those terms by the plaintiff. On the contrary, in defendant’s submission, the objection be expressed in the terms of the law in such as was proposed by defendant. No. 15.” (R. 421-2)

Exception:

“It is objected to on the basis of being a proper comment upon the evidence or within the province of the jury and a ground that it is an inaccurate statement of fact.” (R. 423)

“We further object to that same paragraph on the grounds that it is an unnecessary comment on the evidence and an unnecessary direction by the Court on a factual issue as to whether or not employees of the Olympic Steamship Company such as the plaintiff had the right to control the ship, which we submit in behalf of the defendant is an issue which should be left to the consideration of the jury and not determined by the Court in these instructions.” (R. 425)

“The Court: * * * The Court now allows the exception with like effect as if it were there in the charge because it now is made with the understanding between Counsel and the Court it will have the same effect as if made after the striking and crossing.” (R. 428)

*Specification No. 5**Instruction:*

“In order for the plaintiff to recover, the jury in any event find from a preponderance of the evidence that the plaintiff was at the time of the accident in a place where the same could have been seen by the defendant.”

hand, and in that event plaintiff is entitled to recover in this case.” (R.

Exception:

“The paragraph beginning, ‘In plaintiff to recover,’ defendant objects by the Court in that instruction ‘longshoremen’ on the ground and that defendant submits that that is as to the status of the plaintiff as which should be left to the determination of the jury and should not be so defined in as to be a direction on that particular issue.” (R. 428-9)

Specification No. 6

Instruction:

“As to plaintiff’s allegations of unseaworthiness of the vessel, you are instructed that the vessel was not unseaworthy when, respecting the vessel’s hull, masts, rigging, anchors, appurtenances, cargo and crew, it was reasonably fit for the voyage and service to which the vessel is to be applied.

“The standard of seaworthiness is not absolute perfection, but reasonable fitness.

“A vessel is unseaworthy when its hull, masts, rigging, appurtenances, appliances or crew are not reasonably safe for the uses which it is to be applied to.

fect rendering the appliance unseaworthy sufficient was a latent defect.

“If you find that the P & T ADVENTURE was unseaworthy before and at the time of the collision and that the plaintiff was injured or damaged as a proximate result thereof, then I instruct you in order for plaintiff to recover it is not necessary that he prove that the shipowner or charterer had notice or knowledge of such unseaworthiness or the means of obtaining it.” (R. 405-6)

Exception:

“I don’t have those before me, but I want you to express an objection by the defendant to every one of such instructions on the ground and for the reason as to each of them that they are not tied in with the status of the plaintiff. The jury is not instructed as to the necessity of determining the status of the plaintiff while the ship * * *.” (R. 432)

Specification No. 7

Proposed Instruction:

“The plaintiff has alleged liability of the defendant because of unseaworthiness of the defendant’s vessel.

“You are instructed that a vessel is seaworthy when it is reasonably fit for the voyage to which the vessel is to be applied. It is

sible vessel and gear, and his obligation as to seaworthiness is satisfied by provision of a vessel and gear reasonably safe and suitable even if there may have been equipment more modern or more perfect in some detail. The standard of seaworthiness is not perfection but reasonable fitness.

“ ‘Unseaworthiness’ exists whenever the vessel itself or its appliances, appurtenances, or places of work are not reasonable, safe or adequate for the purposes for which they are intended or ordinarily used.

“Recovery on the grounds of unseaworthiness is limited to seamen and to those persons performing work for the ship which normally has been performed by members of the crew of the vessel.

“Before plaintiff can recover in this case he must establish two facts. First, he must prove that the vessel was unseaworthy. Secondly, *he must prove that he was performing work at the time of the accident which would normally be performed by members of the crew.*” (R.27-8)

Exception:

“I don’t have those before me, but I would like to express an objection by the defendant to each and every one of such instructions on the ground and for the reason as to each of them that they are not tied in with the status of the plaintiff and the jury is not instructed as to the necessity of determining the status of the plaintiff while aboard the ship as proposed by defendant in the last two paragraphs of Defendant’s Proposed Instruction No. 4, and we object to the refusal of the Court to give those sections of Instruction No. 4 as proposed by the defendant.” (R. 432)

*Specification No. 8**Proposed Instruction:*

“In deciding whether or not plaintiff is entitled to recover from the defendant on the charge of negligence you must *determine whether plaintiff was a ‘licensee’ or an ‘invitee’ while aboard the ‘P & T ADVENTURER’* since the extent of the owner’s duty owing to the two classes of persons differs under the law applicable to this case.

“An ‘invitee’ is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the shipowner or operator is then engaged. To establish such relationship there must be some real or supposed mutuality of interest in the subject to which the visitor’s business relates. As to an invitee the shipowner must use reasonable care to discover the actual condition of his premises and either make them safe or to warn him of any latent dangers or defects in the ship or its appliances.

“A ‘licensee’ occupies an intermediate position between that of an invitee and that of a trespasser. He is one who goes upon the premises of another, either without any invitation, express or implied, or else for some purpose not connected with the business conducted on the ship, but goes, nevertheless with the permission or at the toleration of the owner. As to a licensee the shipowner owes him no duty as to its condition, except that it must warn him of perils known to the shipowner and must refrain from wantonly or wilfully injuring him.
* * * ” (R. 29)

Exception:

“Likewise the instructions which thereafter followed, which I’ll have to refer to generally as I

don't have a copy of them, pertaining to negligence and the burden of proof on the plaintiff with respect to the issue of negligence. Defendant objects to each of those instructions as given by the Court on the ground and for the reason as to each of such instructions dealing with negligence that they do not contain portions relating to the necessity of establishing the relationship of the plaintiff to the ship or to the defendant while he was aboard the ship such as were proposed by the defendant in its Instruction No. 7, Proposed Instruction No. 7, and defendant further objects to the refusal of the Court to give Instruction No. 7 as proposed." (R. 433)

Specification No. 9

Proposed Instruction:

"The defendant has pleaded that if plaintiff was injured as alleged in his complaint, any such injuries were caused and contributed to by his own carelessness and negligent acts.

" 'Contributory negligence' is negligence or want of care, as herein defined, on the part of a person suffering injury or damage which proximately contributes to cause the injury and damage complained of.

"In many cases contributory negligence on the part of a plaintiff would defeat his recovery entirely. Since this case is governed by maritime law, a different rule as to contributory negligence is applicable.

"I instruct you that in the event you should find that plaintiff himself was negligent as to any of the acts or omissions as alleged by defendant, such negligence of plaintiff does not bar him from recovery of damages under his complaint, unless you

find that such injuries or damages were caused solely by plaintiff's own negligence, or the sole negligence of some third party, in which event your verdict will be for the defendant.

“If you find that plaintiff's injuries or damage, if any, were caused solely by the unseaworthiness of defendant's vessel and you also find that plaintiff was performing work on the vessel which would normally be performed by seamen or members of the crew so as to be within the class of persons to whom defendant owed a duty to provide a seaworthy vessel, then your verdict will be for the plaintiff, and you will determine the full amount of his damages which you find that he has sustained as the result of the alleged injuries according to the rules on damages about which I will hereafter instruct you.

“If you find that the plaintiff was negligent, and you also find that plaintiff was performing work on the vessel which would normally be performed by seamen or members of the crew so as to be within the class of persons to whom defendant owed a duty to provide a seaworthy vessel, and the defendant's vessel was unseaworthy, or if you find that defendant was negligent and that such unseaworthiness or negligence, if any, contributed to cause the accident of which plaintiff complains, then your verdict will be for the plaintiff and against the defendant, but after determining the full amount of plaintiff's damages, you will diminish the amount to which he would be entitled to recover against the defendant by the proportion in which you find that plaintiff's own negligence contributed to cause his own injuries or damages, if any. (R. 30-32)

Exception:

*“ * * * the objections of the defendant go to the*

failure of the Court to give defendant's Proposed Instruction No. 15 which we feel would be a more adequate statement of the rule as to mitigation of damages and would include in the instruction on damages the necessary portions relating to the determination of whether or not the plaintiff was within the class of workers entitled to recover on a warranty of seaworthiness and also, on the issue of negligence, whether the plaintiff was within the class of workers defined as invitees to whom one duty of care was owed or was within the class of workers defined as licensees to whom another duty of care would be owed." (R. 433-4)

Specification No. 10

Proposed Special Interrogatories:

"In addition to your verdict in this case, you will answer the following interrogatories:

"Interrogatory No. 1: Was the condition of ship's gear and equipment a proximate cause of this accident?

"Answer: ('Yes' or 'No')

"Interrogatory No. 2: If your answer to the preceding interrogatory is 'yes,' was this accident caused solely or in part by the condition of the ship's gear and equipment?

"Answer: Solely ('Yes' or 'No')

In part ('Yes' or 'No')

"Interrogatory No. 3: Was the manner in which longshoremen, employed by a third party, used the ship's gear and equipment a proximate cause of this accident?

"Answer: ('Yes' or 'No')

“Interrogatory No. 4: If your answer to Interrogatory No. 3 is ‘yes,’ was this accident caused solely or in part by the manner in which longshoremen, employed by a third party, used the ship’s gear and equipment?”

“Answer: Solely (‘Yes’ or ‘No’)

In part (‘Yes’ or ‘No’)

“Interrogatory No. 5: Was the plaintiff negligent?”

“Answer: (‘Yes’ or ‘No’)

“Interrogatory No. 6: If your answer to Interrogatory No. 5 is ‘yes,’ was such negligence of plaintiff the sole or a contributing cause of the accident, and if contributing, in what percentage?”

“Answer: (‘Sole’)

(‘Contributing’)

(Fill in percentage plaintiff’s negligence contributed)” (R. 32-3)

Exception:

“Defendant finally objects to the refusal of the Court to give special interrogatories to be answered by the jury as proposed by defendant accompanying its proposed instructions as submitted to the Court at the commencement of the trial of this case. Defendant feels that since we have here what purports to be a single cause of action grounded on either unseaworthiness or negligence, in order to preserve the record, in order to determine the basis on which the jury finds liability, if they should find liability, it is essential and imperative that we have special interrogatories.” (R. 435)

APPENDIX II

Tabulation of Cases Since *Sieracki* Case Holding Various Classes of Persons Not Entitled to Warranty of Seaworthiness

<i>Type of Worker</i>	<i>Name of Case</i>	<i>Court and Date</i>	<i>Citation</i>	<i>Remarks</i>	<i>Reference in This Brief</i>
Repairman working on engine of ship	<i>Berryhill v. Pacific Far East Line</i>	CA 9 1957	238 F.2d 385; cert. den. 354 U.S. 938, 1 L. Ed.2d 1537	Decided after <i>Hawn</i> case	18, 43, 44
Bricklayer engaged in cleaning ship's tanks	<i>Guerrini v. United States</i>	CA 2 1948	167 F.2d 352	Slipped on patch of grease	44, 45
Shipyard rigger engaged in installing ing tank bulkhead	<i>Berge v. National Bulk Carriers, Inc.</i>	CA 2 1958	251 F.2d 717	Decided after <i>Hawn</i> case	18, 19, 20, 32
Shipyard fitter engaged in installing hopper on dredge	<i>Raidy v. United States</i>	D. Md. 1957	153 F.Supp. 777	Decided after <i>Hawn</i> case	18
Tank cleaner engaged in cleaning tanks enroute between ports	<i>Rich v. United States</i>	CA 2 1951	192 F.2d 858	Slipped on ladder as leaving ship	58

Tank cleaner engaged in repair of bottom damage	<i>Manera v. United States</i>	E.D. N.Y. 1954	124 F.Supp. 226	Fell from ship's ladder	59
Shipyard rigger engaged to test cargo handling gear of ship	<i>Filipek v. Moore-McCormack Lines</i>	E.D. N.Y. 1957	156 F.Supp. 854	Decided after <i>Hawn</i> case	18
Shipyard rigger engaged in removal main engine pistons for overhaul	<i>O'Connell v. Naess</i>	CA 2 1949	176 F.2d 138	Eyebolt furnished by ship broke	59
Shipyard rigger using ship's cargo winches to set in place defense guns	<i>Peterson v. United States</i>	S.D. N.Y. 1947	80 F.Supp. 84	Link broke in chain supplied by ship	59
Ship cleaner engaged in cleaning holds after discharge of cargo	<i>De La Pena v. Moore-McCormack Lines</i>	S.D. N.Y. 1948	84 F.Supp. 698	Stepped on loose metal strips and fell	
Surveyor-repair superintendent	<i>Martini v. United States</i>	CA 2 1951	192 F.2d 649	Cargo batten carried away while surveying hold	59

APPENDIX II (continued)

<i>Type of Worker</i>	<i>Name of Case</i>	<i>Court and Date</i>	<i>Citation</i>	<i>Remarks</i>	<i>Reference in This Brief</i>
Municipal fireman standing fire-watch on vessel	<i>McDaniel v. Lisholt</i>	S.D. N.Y. 1957	155 F.Supp. 619	Decided after <i>Hawn</i> case	18, 30
Delivery truck driver carrying a supply of bread aboard a tug	<i>Lee v. Pure Oil Company</i>	CA 6 1955	218 F.2d 711	Drowned while crossing barge to tug	44
Seaman applying for employment on vessel	<i>Milo v. Calmar Steamship Co.</i>	N.D. Cal. 1956	1956 A.M.C. 2149	Summary Judgment granted defendant shipowner	60
Customs officer searching vessel for contraband	<i>Tarkington v. American President Lines</i>	N.D. Cal. 1954	1955 A.M.C. 114	Shipowner's exceptions to libel sustained	20
Visitor who had been issued pass to go aboard ship	<i>Kernarec v. Compagnie Gen. Transatlantique</i>	CA 2 1957	245 F.2d 175	Decided after <i>Hawn</i> case	25, 30, 31

Table of Exhibits as Required by Rule 18-2(f)

<i>Exhibit Number</i>	<i>Description</i>	<i>Identified</i>	<i>Offered</i>	<i>Admitted</i>	<i>Location in Record</i>
<i>For Plaintiff</i>					
3	Seattle Terminals Tariff No. 100 (Excerpts)	176-7	187	187	441-4
4	Seattle Terminals Tariff No. 2-D (Excerpts)	176-8	187	187	445-50
7	Letter of October 14, 1957, from Waterfront Employers Ass'n. showing hours of work of Jack Cordray	346	346	346	451-2
<i>For Defendant</i>					
A-1	Log Book of SS "P&T ADVENTURER" (Excerpts)	91-2	92	92	453-5
A-5	Letter of October 4, 1957, from Waterfront Employers Ass'n. showing earnings of Jack Cordray	341-3	344	345	457-8
A-6	Letter of March 1, 1957, from Waterfront Employers Ass'n. showing earnings of Jack Cordray	342-4	344	345	458-9
A-7)	Photographs taken aboard SS	203-4,	204-5	205	460-1
A-8)	"P&T ADVENTURER" on July 15, 1956 (day after accident)	365-6			
A-9	Stevedoring Contract of July 1,	349-51	352	352	462-79

No. 15863

United States
Court of Appeals
for the Ninth Circuit

POPE & TALBOT, INC., a corporation,
Appellant,
vs.

JACK V. CORDRAY, Appellee.

Transcript of Record

Appeal from the United States District Court
for the Western District of Washington,
Northern Division

FILED

MAR 31 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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LASHER B. GALLAGHER,

351 California Street,
San Francisco 4, California,
Attorneys for Appellant.

ZABEL & POTH,

518 Fourth & Pike Bldg.,
Seattle 1, Washington,
Attorneys for Appellee.

In the United States District Court, Western Dis-
trict of Washington, Northern Division

Civil Action No. 4219

JACK V. CORDRAY, Plaintiff,
vs.

POPE & TALBOT, INC., a foreign corporation,
Defendant.

PETITION FOR REMOVAL

To the Honorable Judges of the Above Entitled
Court:

Pope & Talbot, Inc., a foreign corporation, the defendant in that certain action entitled as above pending in the Superior Court of the State of Washington for King County respectfully petitions for removal of said action from said Superior Court to the above entitled court and in support of such petition alleges and shows as follows:

I.

That said action was commenced in the Superior Court of the State of Washington for King County by service of a copy of the Summons and a copy of the Complaint on the said defendant on the 21st day of August, 1956, and no such service having been previously made and the said defendant never having received prior to said last mentioned date through service or otherwise, copy of said summons or complaint or initial pleading setting forth the claim for relief upon which such action or proceed-

ing is based. There are attached hereto, marked Exhibit "A" and by this reference made a part hereof, a copy of said Summons and a copy of said Complaint so served, said plaintiff never having served upon said defendant any other process, pleadings, or orders whatsoever in said action; that said action is pending and wholly undetermined in the Superior Court of the State of Washington for King County, which said court is within the district and division of the above entitled court.

II.

That by said action plaintiff seeks recovery of damages from said defendant in the sum of \$75,000.00 (exclusive of interest and costs) for alleged personal injuries, medical treatment, pain and suffering and lost wages, alleged to have been caused by the defendant, which said damages are alleged to have resulted from an accident occurring in Seattle, King County, Washington, on or about July 15, 1956.

III.

That said action involving an alleged maritime tort on navigable waters is an action over which the above entitled court has original jurisdiction.

IV.

That Jack V. Cordray, plaintiff in said action, was at the time of commencement of said action and still is a citizen and resident of the State of Washington, residing in Seattle, King County, and the defendant therein, said Pope & Talbot, Inc., a foreign corporation, was at the time of the com-

mencement of said action and still is a non-resident of said state, and then was and still is a corporation organized and existing under and by virtue of the laws of the State of California and a citizen and resident of that state.

V.

That said action is a civil action of which the above entitled United States District Court has original jurisdiction, being a civil action between citizens of different states wherein the amount in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

VI.

That said defendant has caused a removal bond in the reasonable sum of \$250.00 to be executed by good and sufficient corporate surety, conditioned that said defendant will pay all costs and disbursements incurred by reason of removal of said action to the above entitled court should it be determined that said action was not removable or was improperly removed, which bond will be filed with this petition.

Wherefore, said defendant prays that upon the filing of due proof of removal, the above entitled court will exercise its jurisdiction in said action for all other proceedings as required by law.

SUMMERS, BUCEY & HOWARD,
/s/ THEODORE A. LeGROS,

Attorneys for Said Defendant and
Petitioner.

Duly Verified.

EXHIBIT "A"

In the Superior Court of the State of Washington
for King County

JACK V. CORDRAY, Plaintiff,

vs.

POPE & TALBOT, INC., a foreign corporation,
Defendant.

SUMMONS

The State of Washington, to Pope & Talbot, Inc.,
a foreign corporation, Defendant:

You are hereby summoned to appear within twenty days after service of this summons upon you, if served within the State of Washington, and sixty days after service of this summons upon you, if served without the State of Washington, exclusive of the day of service, and defend the above entitled action in the above entitled Court, and answer the complaint of the plaintiff herein and serve a copy of your answer upon the undersigned attorneys for plaintiffs, at their address below stated; and, in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, a copy of which is herewith served upon you, and a copy of which will be filed with the Clerk of said Court.

ZABEL & POTH,

By PHILIP J. POTH,

Attorneys for Plaintiff.

Office and P. O. Address: 518 Fourth & Pike Building, Seattle, Washington.

In the Superior Court of the State of Washington
for King County

JACK V. CORDRAY,

Plaintiff,

vs.

POPE & TALBOT, INC., a foreign corporation,
Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant, complains and alleges as follows:

I.

That the plaintiff, Jack V. Cordray, is now and at all times herein mentioned has been a resident of Seattle, King County, State of Washington, said place being in and within the Territorial confines over which the above entitled Court has jurisdiction.

II.

That the defendant, Pope & Talbot, Inc., a corporation, is a foreign corporation, doing business, and having a place of business in Seattle, King County, State of Washington, and was the owner and operator of the steamship, P&T Adventure, and at all times mentioned in the Complaint, said vessel was employed as a merchant vessel in the navigable waters of Puget Sound.

III.

That prior to the 15th day of July, 1956, the defendant entered into a contract with Olympic

Steamship Co. Inc., said company agreeing to act, and acting, at all times mentioned in this complaint, as an independent contractor, having complete control and supervision of operations pertaining to the loading and discharge of cargo from said defendant's vessel, P&T Adventure, in the Port of Seattle, in the navigable waters of Puget Sound, at Seattle, Washington.

IV.

That as an independent contractor, Olympic Steamship Co., Inc., hired the plaintiff as a foreman of longshoremen, and entered upon the performance of said contract and the plaintiff, at all times herein mentioned, acted under the orders of the Olympic Steamship Co. Inc., in its capacity as an independent contractor or employer, and not as an agent of said vessel, and its said owners and operators.

V.

That plaintiff has elected to recover damages against a third person, other than his employer, to-wit: said defendant, and is entitled to sue here under Section 933 of Title 33, U.S.C.A., and amendments thereto, and defendant has notified the Commissioner of this District, administering the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., 901 et. seq. of said election.

VI.

That on or about the 15th day of July, 1956, at about the hour of 4:45 a.m., the plaintiff while in the course of his employment and in the carrying

out of the duties of his said employment, was obliged to traverse the weather-deck of said vessel while said vessel was moored in the navigable waters of the Port of Seattle, alongside Pier 48 in said harbor; that while plaintiff was in the vicinity of the No. 2 hatch, the pennant on the gantline block on the starboard boom of said No. 2 hatch, suddenly parted and caused said pennant and gantline block to fall and violently strike and injure the plaintiff.

VII.

That said pennant and gantline block was an integral part of the gear, tackle, apparel and furniture of said vessel; that the proximate cause of plaintiff injuries and subsequent damages as more fully hereinafter set out of plaintiff's said injuries was the unseaworthiness of said vessel with respect to its said pennant boom.

VIII.

That as a proximate result of said negligence and the unseaworthiness of said vessel as aforesaid, plaintiff was struck with great force and violence and sustained severe and permanent injuries to his head and neck; that he sustained a severe nervous shock, pain and mental suffering; that the full extent of plaintiff's injuries are as yet not definitely known *by will* be supplied by way of an Amended Complaint as soon as they become definitely ascertained; that plaintiff has been obliged to incur liability by reason of said injuries for hospitalization, medical care and treatment; that libelant has lost

wages, and will continue to lose wages for a long time to come solely by reason of said injuries; that by reason of the foregoing, plaintiff has been damaged in the sum of \$75,000.00.

Wherefore, plaintiff prays for judgment against the defendant for \$75,000.00, together with his costs and disbursements herein to be taxed.

ZABEL & POTH,
By PHILIP J. POTH,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed September 5, 1956.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to the alleged cause of action as set forth in plaintiff's complaint does admit, deny and allege as follows:

I.

Defendant admits Paragraph I of plaintiff's complaint.

II.

Defendant admits Paragraph II of plaintiff's complaint except only that the correct name of defendant's vessel is the "P & T Adventurer".

III.

Defendant denies each and every allegation, matter and thing set forth in Paragraph III of plaintiff's complaint.

IV.

Defendant denies each and every allegation, matter and thing set forth in Paragraph IV of plaintiff's complaint.

V.

Defendant has no knowledge as to the matters set forth in Paragraph V of plaintiff's complaint and therefore denies the same.

VI.

Defendant admits that plaintiff was injured on or about the 15th day of July, 1956 at about 4:45 a.m. when a gantline block of said vessel struck and injured plaintiff but except as so admitted defendant does deny each and every allegation, matter and thing contained in Paragraph VI of plaintiff's complaint.

VII.

Defendant admits that the gantline block was a part of the gear, tackle and equipment of said vessel but except as so admitted does deny each and every other allegation, matter and thing contained in Paragraph VII of plaintiff's complaint.

VIII.

Defendant admits that plaintiff received minor injuries when struck by said block but except as so admitted does deny each and every allegation, matter and thing contained in Paragraph VIII of plaintiff's complaint and does particularly deny that plaintiff has been damaged in the sum of \$75,000.00 or any other sum.

First Affirmative Defense

For further answer and by way of a first affirmative defense the defendant alleges as follows:

I.

That if plaintiff was injured and/or damaged as alleged in plaintiff's complaint all of said injuries and/or damages were proximately caused and contributed to by the negligence of plaintiff by voluntarily placing himself or remaining in a dangerous position, in failing or omitting to take reasonable precautions for his own safety and in other further and negligent acts or omissions the particulars of which are not presently available to this defendant and for which it will ask leave to amend when said particulars become known.

Wherefore, having fully answered plaintiff's complaint defendant prays that said complaint be dismissed with prejudice and that defendant have and recover its costs and disbursements herein to be taxed.

SUMMERS, BUCEY & HOWARD,
/s/ By THEODORE A. LeGROS,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 11, 1956.

[Title of District Court and Cause.]

NOTICE OF APPLICATION FOR TRIAL
AMENDMENT

To: The Defendant above named, and to, Summers,
Bucey & Howard, Its Attorneys:

You, and Each of You, will please take notice that at the commencement of the trial of the above entitled cause, on the 16th day of April, 1957, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, plaintiff will apply to the Court for leave to amend paragraph VII of plaintiff's complaint as follows:

VII.

That the proximate causes of plaintiff's injuries and damages, as more fully hereinafter set forth, were the unseaworthiness of said vessel with respect to said pennant and gantline block, the negligence of the officers and personnel aboard said vessel, and the breach of defendant's non-delegable duty to safeguard plaintiff, a business guest and invitee aboard said vessel, from injury by negligent acts.

Dated this 11th day of April, 1957.

ZABEL & POTH,
/s/ By PHILIP J. POTH,

Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 12, 1957.

[Title of District Court and Cause.]

ORDER GRANTING LEAVE FOR AMEND-
MENT OF PLAINTIFF'S COMPLAINT

This matter coming on regularly for hearing on application of the plaintiff for leave to amend his complaint in respect to paragraph VII; now, therefore, it is hereby

Ordered, Adjudged and Decreed that leave is hereby granted to plaintiff to substitute for the present language of paragraph VII of plaintiff's complaint, the following:

VII.

That the proximate causes of plaintiff's injuries and damages, as more fully hereinafter set forth, were the unseaworthiness of said vessel with respect to said pennant and gantline block, the negligence of the officers and personnel aboard said vessel, and the breach of defendant's non-delegable duty to safeguard plaintiff, a business guest and invitee aboard said vessel, from injury by negligent acts.

Done in Open Court this 27th day of May, 1957.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ PHILIP J. POTH
Of Counsel for Plaintiff.

Approved as to form only—Notice presentation
waived:

/s/ CHARLES B. HOWARD

Of Counsel for Defendant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed May 27, 1957.

[Title of District Court and Cause.]

DEFENDANT'S ANSWER TO AMENDMENT
OF PLAINTIFF'S COMPLAINT

Comes now the defendant and for answer to the amendment in Paragraph 7 of Plaintiff's Complaint as authorized by order of court entered May 27, 1957, does admit, deny and allege as follows:

I.

Defendant denies each and every allegation contained in the amendment to Paragraph 7 of Plaintiff's Complaint.

II.

Defendant restates and realleges its first affirmative defense as contained in original Answer served and filed in this cause on September 11, 1956.

Wherefore, having fully answered the amendment to Plaintiff's Complaint, defendant prays that the same be dismissed with prejudice and that de-

fendant have and recover its costs and disbursements herein to be taxed.

SUMMERS, BUCEY & HOWARD,
/s/ CHARLES B. HOWARD,
Attorneys for Defendant.

Acknowledgment of Receipt of Copy Attached.
[Endorsed]: Filed May 29, 1957.

[Title of District Court and Cause.]

PRETRIAL ORDER

Admitted Facts

I.

That the plaintiff, Jack V. Cordray, age 36 at the time of the accident, is now, and at all times herein mentioned, has been a resident of Seattle, King County, State of Washington, said place being in and within the Territorial confines over which the above entitled Court has jurisdiction.

II.

That the defendant, Pope & Talbot, Inc., a corporation, is a foreign corporation, incorporated under the laws of the State of California, with its principal place of business in San Francisco, California; that at all times herein pertinent, said defendant was doing business, and had a place of business, in Seattle, King County, State of Washington, and was the owner and operator of the

steamship, P & T Adventurer, said vessel being employed as a merchant vessel on the navigable waters of Puget Sound, and elsewhere.

III.

That there exists a diversity of citizenship between the plaintiff and the defendant, and the venue of this action is properly in this Honorable Court. (Title 28, U. S. C. A., 1332.)

IV.

That prior to the 15th day of July, 1956, the defendant entered into a contract with Seattle Stevedore Co., said Company agreeing to act, and acting at all times mentioned in this complaint as an independent contractor, having complete control and supervision of all operations pertaining to the discharge of cargo from the holds of defendant's said vessel to the ship's side at Pier 48, in the Port of Seattle, in the navigable waters of Puget Sound, on the said 15th day of July, 1956.

V.

That prior to the 15th day of July, 1956, on which date plaintiff was engaged in the moving of cargo from ship's side to place of rest on dock or railway car, the defendant entered into an agreement with Olympic Steamship Co., Inc., to, in the course of its own public dock business and not as the appointed agent of Pope & Talbot, or Seattle Stevedore Co., receive, at ship's side at said Olympic Steamship Co.'s dock at Pier 48, and to stow

in the warehouse on, and in railroad cars on spur tracks at, said dock, the cargo of the P & T Adventurer, upon compensation for work done before the cargo comes to rest where stowed on the dock or loaded on railroad cars payable by Pope & Talbot to said Olympic Steamship Co.

VI.

That in pursuance of its aforesaid handling of the said ship's cargo, Olympic Steamship Co., Inc., employed the plaintiff, Jack V. Cordray, as a foreman over other shoreside workmen, employed by it handling said cargo on its said Pier 48.

VII.

That at all times pertinent herein, plaintiff was so employed.

VIII.

That plaintiff has elected to recover damage against a third person, other than his employer, to-wit: Said Defendant, and is entitled to sue here under Section 933 of Title 33, U. S. C. A., and amendments thereto, and plaintiff has notified the Commissioner of the District, administering the Longshoremen's and Harbor Workers' Compensation Act, U. S. C. A. 901, et seq., of said election.

IX.

That the plaintiff, Jack V. Cordray, was injured while on the deck of the S. S. P & T Adventurer, in the vicinity of No. 2 hatch during the early morning of July 15, 1956.

X.

That following said accident, the plaintiff was hospitalized and has undergone medical treatment and has incurred expense for hospitals and doctors; that prior to the accident which occurred on July 15, 1956, he had been involved in another industrial accident causing injury to his back for which he underwent surgery by Dr. D. G. Leavitt for repair of a herniated disc in the region of the lower back.

XI.

That the S. S. P & T Adventurer was in navigable waters within the Western District of Washington at the time of this action, and this Court has jurisdiction of the subject matter and the parties to the action.

The foregoing facts, are agreed to by the parties, but each party expressly reserves the right to present at the trial of this action, evidence on said facts and other pertinent or subsidiary facts at the trial of this cause.

Defendant's Contended Issues of Fact

1. Whether or not Olympic Steamship Co., Inc., as the employer of plaintiff, had any written or oral contract or agreement with defendant Pope & Talbot, Inc. calling for it to perform any stevedoring services involved in the loading and/or discharging of cargo from the SS P&T Adventurer at Pier 48, Seattle, on 14-15 July, 1956.

2. Whether or not Olympic Steamship Co., Inc., as the employer of plaintiff, did in fact perform any stevedoring services involved in the loading and/or discharging of cargo from the SS P&T Adventurer at Pier 48, Seattle, on 14-15 July, 1956.

3. Whether or not the operations of Olympic Steamship Co., Inc. on 14-15 July, 1956 were limited to the receipt and handling or movement of such cargo from the SS P&T Adventurer at Pier 48, Seattle, under the terms of Seattle Terminals Tariff No. 2-D and No. 100 after such cargo had been discharged from the SS P&T Adventurer by Seattle Stevedore Co. as an independent stevedore contractor.

4. Whether or not slingmen employed by Seattle Stevedore Co. and stationed on Pier 48 adjacent to the SS P&T Adventurer performed all services required in connection with the connecting and/or disconnecting of cargo slings and cargo handling gear being used by Seattle Stevedore Co. as an independent stevedore contractor in discharging and/or loading cargo from or to the SS P&T Adventurer at Pier 48 on 14-15 July, 1956.

5. Whether or not plaintiff Cordray, as a dock foreman employed by Olympic Steamship Co., Inc., at Pier 48, Seattle, on 14-15 July, 1956 had any duties which required him to be present aboard the SS P&T Adventurer during loading and/or discharging operations being conducted by Seattle Stevedore Co. as an independent stevedore contractor employed by defendant Pope & Talbot, Inc.

6. Whether or not longshoremen employed by Seattle Stevedore Co. were the only persons engaged in winging in the booms and securing the cargo handling gear at the No. 2 hatch on the SS P&T Adventurer immediately prior to the accident to plaintiff on the morning of 15 July, 1956.

7. Whether or not plaintiff Cordray was engaged in any way in the operation of winging in the booms or securing the cargo handling gear of the SS P&T Adventurer on the morning of 15 July, 1956, and whether or not plaintiff Cordray had any responsibility or duties in connection with such operations.

8. Whether or not plaintiff Cordray had any legitimate business aboard the SS P&T Adventurer on the morning of 15 July, 1956 immediately before the accident in question.

9. What caused the wire strap attached to the tip of the No. 2 starboard boom of the SS P&T Adventurer to carry away on the morning of 15 July, 1956?

10. Was the SS P&T Adventurer seaworthy? If not, what was the unseaworthy condition?

11. Was the defendant Pope & Talbot, Inc., negligent with respect to the accident to plaintiff Cordray on 15 July, 1956?

12. Was plaintiff Cordray contributorily negligent with respect to the accident on 15 July, 1956? If so, to what extent or in what percentage did

plaintiff's negligence contribute to cause the accident?

13. In what amount if any did plaintiff sustain damages as a result of the accident in question, such as

(a) Loss of past earnings and any reduction in future earning capacity.

(b) Medical and hospital expenses incurred by plaintiff for which payment has not and will not be assumed or paid by other persons.

(c) Pain and suffering.

Defendant's Contended Issues of Law

1. What was the status of plaintiff Cordray as a dock foreman while aboard the SS "P&T Adventurer" with particular regard to whether he was a longshoreman or stevedore, a business guest-invitee, a mere licensee or a trespasser?

2. Was plaintiff Cordray within the class of workers to whom the defendant shipowner owed a duty to supply a seaworthy vessel?

3. Is plaintiff Cordray entitled to recover damages from the defendant even though he fails to prove that his injuries were proximately caused by any negligence of the defendant as alleged in the complaint?

4. Did defendant have a non-delegable duty to provide plaintiff Cordray with a safe place to work while plaintiff was aboard the SS "P&T Adventurer"? If so, can plaintiff recover damages against

defendant on proof of breach of any such alleged duty without proving negligence of the defendant?

Plaintiff Contends That the Issues of Fact to Be Determined Are as Follows:

I.

Whether or not plaintiff, Cordray, as a foreman, employed by Olympic Steamship Co., Inc., at Pier 48, Seattle, King County, Washington, on July 15, 1956, had any duties or business which caused him to be present aboard the S. S. P & T Adventurer during loading and/or discharging operations being conducted by the Seattle Stevedore Co. as an independent stevedore contractor employed by defendant, Pope & Talbot, Inc.

II.

If plaintiff had any business or duties aboard the vessel, were the same in any way related to the vessel's cargo?

III.

How did plaintiff's accident occur?

IV.

Was the accident caused by unseaworthiness and/or negligence, or both?

V.

Was the plaintiff negligent, and, if so, did said negligence contribute to his injuries?

VI.

What were the damages, if any, sustained by plaintiff?

Plaintiff Contends That the Issues of Law to Be Determined Are as Follows:

I.

Was the tort, if any, maritime?

II.

What was the legal status of the plaintiff when he was injured aboard the vessel:

- a. Longshoreman;
- b. Business guest invitee;
- c. Merely licensee; or
- d. Trespasser?

III.

What duty did defendant vessel owner owe the plaintiff when he was aboard said vessel in respect to:

- a. Warranty of seaworthiness;
- b. Duty to provide plaintiff with a safe place in which to work; or
- c. Negligence?

IV.

What was the responsibility of the vessel owner for the negligence, if any, of Seattle Stevedore Co.?

The plaintiff and defendant expressly reserve the right to present at the trial of this action, other pertinent or subsidiary facts and issues of fact and law which conceivably could arise during the progress of the trial.

Done in Open Court at Seattle, Washington, this
18th day of October, 1957.

/s/ JOHN C. BOWEN,
United States District Judge.

Form Approved:

/s/ PHILIP J. POTH,
Attorneys for Plaintiff.

/s/ CHARLES B. HOWARD,
Attorneys for Defendant.

[Endorsed]: Filed October 18, 1957.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR DISMISSAL
OF ACTION UNDER F.R.C.P. RULE 41(b)

At the close of plaintiff's evidence, defendant hereby moves for dismissal of plaintiff's action on the ground that upon the facts of record and upon the law applicable to said action, that plaintiff has shown no right to relief against the defendant Pope & Talbot, Inc.

SUMMERS, BUCEY & HOWARD,
/s/ CHARLES B. HOWARD,
Attorneys for Defendant.

[Endorsed]: Filed November 13, 1957.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR DIRECTED
VERDICT AGAINST PLAINTIFF UN-
DER F.R.C.P. RULE 50 (AT CLOSE OF
ALL EVIDENCE)

At the close of all of the evidence in the above entitled action, defendant hereby moves for a directed verdict against the plaintiff and in favor of the defendant, Pope & Talbot, Inc. upon the following specific grounds:

1. That all such evidence fails to show that plaintiff is entitled to relief from defendant on the ground of unseaworthiness;
2. That all such evidence fails to show that plaintiff is entitled to relief against defendant on the basis of negligence or negligent failure to perform any duty owing from defendant to plaintiff;
3. That all such evidence fails to show any unseaworthiness of the vessel or negligence of defendant on the basis of which plaintiff would be entitled to recover against defendant.

SUMMERS, BUCEY & HOWARD,
/s/ CHARLES B. HOWARD,
Attorneys for Defendant.

[Endorsed]: Filed November 14, 1957.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTIONS

Comes now the defendant Pope & Talbot, Inc., and without waiving motions made or to be made during the trial of this cause, respectfully requests the court to instruct the jury as follows:

SUMMERS, BUCEY & HOWARD,
/s/ By CHARLES B. HOWARD,
Attorneys for Defendant.

* * * * *

Instruction No.....

The plaintiff has alleged liability on the part of the defendant because of unseaworthiness of defendant's vessel.

You are instructed that a vessel is seaworthy when it is reasonably fit for the voyage or the work to which the vessel is to be applied. It is a vessel in a fit state as to repairs, equipment and crew and in all other respects to encounter and meet the ordinary perils of the voyage. The test of seaworthiness is whether the vessel is reasonably fit to carry a cargo and crew which it has undertaken to transport.

An owner is not obliged to provide the best possible vessel and gear, and his obligation as to seaworthiness is satisfied by provision of a vessel and gear reasonably safe and suitable even if there may have been equipment more modern or more

perfect in some detail. The standard of seaworthiness is not perfection but reasonable fitness.

“Unseaworthiness” exists whenever the vessel itself or its appliances, appurtenances, or places of work are not reasonable, safe or adequate for the purposes for which they are intended or ordinarily used.

Recovery on the grounds of unseaworthiness is limited to seamen and to those persons performing work for the ship which normally has been performed by members of the crew of the vessel.

Before plaintiff can recover in this case he must establish two facts. First, he must prove that the vessel was unseaworthy. Secondly, he must prove that he was performing work at the time of the accident which would normally be performed by members of the crew.

Instruction No.

The term “non-delegable duty”, as referred to in these instructions, relates only to a shipowner’s obligation to provide a seaworthy vessel to seamen and to workmen engaged in types of work traditionally performed by seamen. The term “non-delegable duty” does not relate to charges of negligence.

A “non-delegable duty” is a duty whose performance may properly be delegated to another person, but subject to the condition that liability will follow if the person to whom the performance is delegated acts improperly with respect to it.

* * * * *

Instruction No.....

In deciding whether or not plaintiff is entitled to recover from the defendant on the charge of negligence you must determine whether plaintiff was a "licensee" or an "invitee" while aboard the "P&T Adventurer" since the extent of the owner's duty owing to the two classes of persons differs under the law applicable to this case.

An "invitee" is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the shipowner or operator is then engaged. To establish such relationship there must be some real or supposed mutuality of interest in the subject to which the visitor's business relates. As to an invitee the shipowner must use reasonable care to discover the actual condition of his premises and either make them safe or to warn him of any latent dangers or defects in the ship or its appliances.

A "licensee" occupies an intermediate position between that of an invitee and that of a trespasser. He is one who goes upon the premises of another, either without any invitation, express or implied, or else for some purpose not connected with the business conducted on the ship, but goes, nevertheless with the permission or at the toleration of the owner. As to a licensee the shipowner owes him no duty as to its condition, except that it must warn him of perils known to the shipowner and must refrain from wantonly or wilfully injuring him.

Instruction No.....

You are instructed that if you find from the evidence that plaintiff's alleged injuries, if any, were caused solely by reason of improper use of a proper appliance by longshoremen employed by Seattle Stevedore Co., then your verdict must be for the defendant.

* * * * *

Instruction No.....

You are instructed that a person may not cast the burden of his own protection upon another. He owes this duty to himself. The law does not permit him to close his eyes to risk, or danger, and then, if he is injured as the result of such risk or danger, to be excused from the consequences of his own act or omission. He must use his own intelligence and faculties for his own protection.

* * * * *

Instruction No.....

The defendant has pleaded that if plaintiff was injured as alleged in his complaint, any such injuries were caused and contributed to by his own carelessness and negligent acts.

“Contributory negligence” is negligence or want of care, as herein defined, on the part of a person suffering injury or damage which proximately contributes to cause the injury and damage complained of.

In many cases contributory negligence on the part of a plaintiff would defeat his recovery entirely. Since this case is governed by maritime law,

a different rule as to contributory negligence is applicable.

I instruct you that in the event you should find that plaintiff himself was negligent as to any of the acts or omissions as alleged by defendant, such negligence of plaintiff does not bar him from recovery of damages under his complaint, unless you find that such injuries or damages were caused solely by plaintiff's own negligence, or the sole negligence of some third party, in which event your verdict will be for the defendant.

If you find that plaintiff's injuries or damage, if any, were caused solely by the unseaworthiness of defendant's vessel and you also find that plaintiff was performing work on the vessel which would normally be performed by seamen or members of the crew so as to be within the class of persons to whom defendant owed a duty to provide a seaworthy vessel, then your verdict will be for the plaintiff, and you will determine the full amount of his damages which you find that he has sustained as the result of the alleged injuries according to the rules on damages about which I will hereafter instruct you.

If you find that the plaintiff was negligent, and you also find that plaintiff was performing work on the vessel which would normally be performed by seamen or members of the crew so as to be within the class of persons to whom defendant owed a duty to provide a seaworthy vessel, and the defendant's vessel was unseaworthy, or if you find that defendant was negligent and that such unsea-

worthiness or negligence, if any, contributed to cause the accident of which plaintiff complains, then your verdict will be for the plaintiff and against the defendant, but after determining the full amount of plaintiff's damages, you will diminish the amount to which he would be entitled to recover against the defendant by the proportion in which you find that plaintiff's own negligence contributed to cause his own injuries or damages, if any.

Special Interrogatories

In addition to your verdict in this case, you will answer the following interrogatories:

Interrogatory No. 1: Was the condition of ship's gear and equipment a proximate cause of this accident?

Answer:.....("Yes" or "No")

Interrogatory No. 2: If your answer to the preceding interrogatory is "yes", was this accident caused solely or in part by the condition of the ship's gear and equipment?

Answer: Solely("Yes" or "No")

In part.....("Yes" or "No")

Interrogatory No. 3: Was the manner in which longshoremen, employed by a third party, used the ship's gear and equipment a proximate cause of this accident?

Answer:.....("Yes" or "No")

Interrogatory No. 4: If your answer to Interrogatory No. 3 is "yes", was this accident caused solely or in part by the manner in which longshore-

men, employed by a third party, used the ship's gear and equipment?

Answer: Solely ("Yes" or "No")

In part..... ("Yes" or "No")

Interrogatory No. 5: Was the plaintiff negligent?

Answer:..... ("Yes" or "No")

Interrogatory No. 6: If your answer to Interrogatory No. 5 is "yes", was such negligence of plaintiff the sole or a contributing cause of the accident, and if contributing, in what percentage?

Answer:..... ("Sole")

..... ("Contributing")

..... (Fill in percentage plaintiff's negligence contributed)

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed November 7, 1957.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Entitled Cause, Find for the Plaintiff and assess Plaintiff's amount of recovery in the sum of Twenty Eight Thousand and Seven Hundred Fifty Dollars (\$28,750).

/s/ D. E. CORNELL,

Foreman.

[Endorsed]: Filed November 15, 1957. Entered November 18, 1957.

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES SHOW-
ING ENTRY OF JUDGMENT

* * * * *

1957

Nov. 15—Ent. record of trial to jury. (6th day).

” —Filed verdict for plaintiff and against the
defendant in the sum of \$28,750.00.

18—Ent. Judgment in favor of Plaintiff and
against deft. in the sum of \$28,750.00 in
Civil Docket in accordance with Rule 58
F.R.C.P.

22—Filed Deft's Motion for a New Trial un-
der FRCP Rule 59.

22—Filed Motion to have verdict and any
judgment thereon set aside and for entry
Judgment in accordance with motions for
Directed Verdict under FRCP Rule
50(b). * * * * *

Dec. 13—Filed and ent. order denying defendant's
motion for Judgment notwithstanding the
verdict and motion for new trial.

* * * * *

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR A NEW TRIAL
UNDER F.R.C.P. RULE 59

In the alternative and subject to the court's fur-
ther ruling on motions for a directed verdict or a

judgment notwithstanding the verdict of the jury under F.R.C.P. Rule 50, defendant moves the court for an order granting it a new trial of this action upon the following grounds:

1. Error in instructions to the jury concerning the law applicable to the case, to which instructions and the failure to give proposed instructions submitted in writing by defendant exceptions or objections were duly taken by defendant's counsel before the case was finally submitted to the jury;

2. Abuse of discretion and error of law by the Court wherein the Court permitted plaintiff to amend paragraphs III and VIII of the complaint after the close of plaintiff's case in chief and after the commencement of presentation of evidence on defendant's answering case;

3. That the damages awarded plaintiff by the verdict of the jury are excessive and are entirely unsupported as to amount by the undisputed evidence presented in the case;

4. That the damages awarded plaintiff by the verdict of the jury are so grossly excessive as to unmistakably indicate that the amount of the verdict was the result of passion and prejudice by the jury.

5. Abuse of discretion and error of law by the Court in submitting to the jury general form of verdict without Special Interrogatories requested in writing by defendant thereby rendering it impossible to determine whether the verdict for plaintiff was found by the jury on alleged unseaworthi-

ness or alleged negligence, adversely and prejudicially affecting defendant's rights to preserve these questions for further consideration if an appeal is taken.

6. Other errors of law occurring during the course of the trial.

This Motion is based upon the records herein, the evidence and proceedings at the trial as set forth in Local Civil Rule 48, transcript of the objections made by defendant's counsel and transcript of the instructions as given by the Court, which will be filed in support of the Motion.

Dated this 22nd day of November, 1957.

SUMMERS, BUCEY & HOWARD,
/s/ CHARLES B. HOWARD,

Attorneys for Defendant, Pope &
Talbot, Inc.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

MOTION TO HAVE VERDICT AND ANY
JUDGMENT THEREON SET ASIDE AND
FOR ENTRY JUDGMENT IN ACCORD-
ANCE WITH MOTIONS FOR DIRECTED
VERDICT UNDER F.R.C.P. RULE 50(b)

Defendant Pope & Talbot, Inc., both at the close of the evidence offered by the plaintiff and at the

close of all the evidence offered at the trial, having made motions for directed verdict in favor of the defendant and against the plaintiff upon specific grounds as stated in the motions on file herein and as argued to the court at the time of presentation of said motions, each of which motions having been denied and verdict of the jury having been returned on November 15 in favor of the plaintiff and against this defendant, does:

In accordance with F.R.C.P. Rule 50(b) and in harmony with each of the aforesaid motions, move for an order setting aside said verdict as against the defendant and setting aside any judgment entered thereon, upon the following grounds:

1. That all such evidence fails to show that plaintiff is entitled to relief from defendant on the ground of unseaworthiness;
2. That all such evidence fails to show that plaintiff is entitled to relief against defendant on the basis of negligence or negligent failure to perform any duty owing from defendant to plaintiff;
3. That all such evidence fails to show any unseaworthiness of the vessel or negligence of defendant on the basis of which plaintiff would be entitled to recover against defendant.

Defendant further moves for entry of judgment of dismissal in its favor and against the plaintiff.

Dated this 22nd day of November, 1957.

SUMMERS, BUCEY & HOWARD,
/s/ CHARLES B. HOWARD,

Attorneys for Defendant, Pope &
Talbot, Inc.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

ORDER ON POST TRIAL MOTIONS

This cause having come on regularly for hearing on December 9, 1957 before the above entitled Court upon defendant's alternative Motions for Judgment Notwithstanding the Verdict and for New Trial, each party being represented by counsel, the Court having considered the argument of counsel, the brief of defendant in support of said Motions and the transcripts filed in support thereof, and having thereupon announced its ruling denying both of said Motions, now therefore, in conformity therewith it is hereby:

1. Ordered that Motion of Defendant for Judgment Notwithstanding the Verdict be and it is hereby denied; and it is further

2. Ordered that Motion of Defendant for a New Trial be and it is hereby denied.

Done in Open Court this 13th day of December, 1957.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Prepared and presented by:

/s/ CHARLES B. HOWARD
Of Attorneys for Defendant.

Approved by:

ZABEL & POTH,
/s/ By OSCAR A. ZABEL,
Of Attorneys for Plaintiff.

Notice of presentation waived.

/s/ PHILIP J. POTH.

[Endorsed]: Filed and Entered Dec. 13, 1957.

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND
ON APPEAL

Know All Men by These Presents:

That we, Pope & Talbot, Inc., a corporation, the defendant in the above cause, as principal, and Glens Falls Insurance Company, a corporation authorized to transact a surety business within the State of Washington, as surety, are held and firmly bound unto Jack V. Cordray, the plaintiff in said cause, in the sum of Thirty-Two Thousand and No/100 Dollars (\$32,000.00), lawful money of the United States, for the full and complete payment

of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Whereas, said above named Jack V. Cordray, as plaintiff, has heretofore filed his complaint against the defendant, Pope & Talbot, Inc., a foreign corporation, to recover damages for reasons in said complaint alleged; and

Whereas, after trial upon all issues in said cause, the jury returned a verdict on November 18, 1957 upon which judgment has now been entered in the full sum of Twenty-eight Thousand Seven Hundred Fifty and No/100 Dollars (\$28,750.00), together with plaintiff's costs and disbursements herein to be taxed, and with interest thereon until paid; and

Whereas, notice of appeal has now been served and filed in said cause by the defendant, Pope & Talbot, Inc., to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such that if said Pope & Talbot, Inc., as the defendant and appellant and as the principal herein, shall pay the judgment and decree heretofore entered herein, together with any costs, damages and interest that may be awarded against it on appeal or dismissal thereof, or failure to make its plea good; or if said Pope & Talbot, Inc. shall perfect and prosecute an appeal and shall abide by and answer and pay the money awarded by whatever judgment may be rendered by any appellate court

on appeal in the above entitled cause, or whatever judgment may be rendered by the District Court on the mandate of said appellate court, including all damages, costs and interest awarded thereby; then this obligation shall be void, otherwise it shall remain in full force and effect.

Signed and sealed this 13th day of December, 1957.

POPE & TALBOT, INC.,
A Corporation,

By SUMMERS, BUCEY & HOWARD,
/s/ CHARLES B. HOWARD,

Its Attorneys,
Principal.

[Seal] GLENS FALLS INSURANCE
COMPANY,

/s/ By VAN C. GRIFFIN,

Its Attorney-in-Fact,
Surety.

Approved as to amount and notice of presentation waived.

/s/ PHILIP J. POTH.

The foregoing bond is approved, both as a bond staying execution pending appeal and as a cost and supersedeas bond upon appeal.

Done in Open Court this 13th day of December,
1957.

/s/ JOHN C. BOWEN,
District Judge.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed December 13, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Pope & Talbot, Inc., a corporation, as the Defendant in this cause does hereby appeal to the United States Court of Appeals for the Ninth Circuit from each and every part of the Judgment entered upon the verdict of the jury in this cause on November 18, 1957.

Dated at Seattle, Washington this 13th day of December, 1957.

SUMMERS, BUCEY & HOWARD,
/s/ CHARLES B. HOWARD,
Attorneys for Defendant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed December 16, 1957.

[Title of District Court and Cause.]

ORDER AS TO EXHIBITS AND PLEADINGS

On ex parte motion of appellant, Pope & Talbot, Inc., formerly the defendant herein, it is hereby

Ordered and Directed that as a part of the record on appeal in the above entitled action the Clerk of this Court shall transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit the original of all exhibits and pleadings, as required by the rules or as designated either by the appellant or by the appellee in this cause.

Done in Open Court this 20th day of January, 1958.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Prepared, approved and presented by:

SUMMERS, BUCEY & HOWARD,
/s/ CHARLES B. HOWARD,
Attorneys for Appellant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed January 20, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States

District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) FRCP, and designations of counsel, I am transmitting herewith the following original documents in the file dealing with the action, and true copies of certain journal entries, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Petition for Removal, with complaint attached, filed 9-5-56.

4. Answer of defendant, filed 9-11-56.

8. Discovery Deposition of Jack V. Cordray, filed 3-14-57.

12. Motion for Continuance, filed 4-11-57.

13. Notice of Hearing on Motion for Continuance, filed 4-11-57.

14. Notice of Application for Trial Amendment, filed 4-12-57.

Clerk's journal entry of April 12, 1957 concerning application for trial amendment and motion for continuance.

Clerk's journal entry of April 18, 1957 concerning application for trial amendment and motion for continuance.

18. Order Granting Leave for Amendment of Plaintiff's Complaint, filed 5-27-57.

19. Defendant's Answer to Amendment of Plaintiff's Complaint, filed 5-29-57.

26. Pretrial Order, filed Oct. 18, 1957.

35. Defendant's Requested Instructions, filed 11-7-57.

36. Plaintiff's Proposed Instructions, filed 11-7-57.

40. Defendant's Motion for Dismissal of Action under FRCP Rule 41(b), filed 11-13-57.

41. Defendant's Motion for Directed Verdict Against Plaintiff Under FRCP Rule 50 (At Close of all Evidence), filed 11-14-57.

41a. Defendant's Motion for Directed Verdict Under FRCP Rule 50, filed 11-14-57.

42. Verdict, filed Nov. 15, 1957, for plaintiff.

Excerpt from Clerk's Civil Docket Entries showing entry of judgment on verdict, in Civil Docket on 11-18-57.

43. Defendant's Motion for New Trial Under FRCP Rule 59, filed 11-22-57.

44. Motion to have Verdict and Any Judgment Thereon set aside and for entry of judgment in accordance with motions for directed verdict, filed 11-22-57.

45. Court Reporter's Transcript of Court's Instructions to Jury, filed 11-25-57. (Page 533, Statement of Facts, Volume II.)

46. Court Reporter's Transcript of Proceedings of 11-15-57, filed 12-4-57. (Page 531, Statement of Facts, Volume II.)

47. Court Reporter's Transcript of Testimony of Drs. Gray and Miller, filed 12-4-57. (Gray—Statement of Facts, Volume I, Page 118.) (Miller—Statement of Facts, Volume I, Page 274.)

49. Order Denying Motion for Judgment NOV and Motion for New Trial, filed 12-13-57.

50. Cost and Supersedeas Bond on Appeal, filed 12-13-57.

51. Notice of Appeal, filed 12-16-57.

52. Appellant's Designation of Record on Appeal, filed 12-20-57.

53. Statement of Points Upon Which Appellant Intends to Rely, filed 12-20-57.

54. Statement of Proceedings During Trial Which were not Stenographically reported, filed 12/20/57.

56. Statement of Appellee in Response to Defendant Appellants' Purported Statement of Proceedings During Trial which were not Stenographically reported, filed 12/27/57.

57. Motion of Plaintiff-appellee to Strike Defendant's Purported Statement of Proceedings during Trial which were Not Stenographically reported, filed 12/27/57.

58. Appellee's Supplemental Designation of Record, filed 12/27/57.

60. Affidavit of Philip J. Poth in Opposition to Appellant's Statement of Proceedings not Stenographically Reported, filed 1/2/58.

61. Findings and Order on Defendant's Motion to Include in Record on Appeal Document entitled Statement of Proceedings During Trial which were not Stenographically Reported, filed 1/2/58.

62. Appellant's Supplemental Designation of Record on Appeal, filed 1/3/58.

64. Appellant's Second Supplemental Designation of Record on Appeal, filed 1/15/58.

65. Appellant's Third Supplemental Designation of Record on Appeal, filed 1/16/58.

66. Order Directing Transmission of Original Exhibits, filed 1/20/58.

67. Court Reporter's Statement of Facts, Volumes I and II, filed 1/21/58.

68. Court Reporter's Transcript of Proceedings held 1/2/58 on Defendant's Application to Include Statement in Appeal of Proceedings not Stenographically Reported and Plaintiff's Motion to Strike Statement of Proceedings Not Reported, filed 1/21/58.

Plaintiff Exhibits 1 to 7, inclusive, and

Defendant Exhibits A-1 to A-10, inclusive.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellants for preparation of the record on appeal in this cause, to-wit, Filing fee, Notice of Appeal, \$5.00; and that

said amount has been paid to me by counsel for appellants.

Witness my hand and official seal at Seattle this 21st day of January, 1958.

[Seal] MILLARD P. THOMAS,
Clerk,

/s/ By TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States, Western
District of Washington, Northern Division

No. 4219

JACK V. CORDRAY, Plaintiff,

vs.

POPE & TALBOT, INC., a foreign corporation,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that the above entitled and numbered cause was heard before the Honorable John C. Bowen, one of the Judges of the above entitled Court, and a jury, beginning Thursday, November 7, 1957, at 1:55 o'clock p.m.

The plaintiff was represented by Mr. Philip J. Poth, of Messrs. Zabel & Poth, Attorneys at Law.

The defendant was represented by Mr. Charles

B. Howard and Mr. Ramon E. Brown, of Messrs. Summers, Bucey & Howard, Attorneys at Law. [1*]

* * * * *

(Thereupon, a jury was duly empaneled and sworn.) [2]

* * * * *

(Thereupon, Mr. Poth made an opening statement to Court and jury in behalf of plaintiff.)

The Court: The defendant at this time or later at another proper stage in the trial may make its opening statement.

(Thereupon, Mr. Howard made an opening statement to Court and jury in behalf of defendant.)

The Court: The plaintiff may now call his first witness or otherwise proceed with his case in chief.

Mr. Poth: Call Mr. Peters, please. [6]

ROBERT L. PETERS, JR.

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Poth): Will you state your name, please? A. Robert L. Peters, Jr.

* * * * *

Q. What is your occupation?

A. Stevedore foreman.

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

(Testimony of Robert L. Peters, Jr.)

Q. And how long have you been a stevedore foreman? A. About thirteen years.

Q. And what did you do before you were a stevedore foreman? A. Longshoreman.

Q. And where was that?

A. In the City of Boston.

Q. And what has been your employment, that is as to employers, since you left Boston?

A. Well, I worked for the Waterfront Employers of Washington.

Q. And were you in the service? [7]

A. Yes, sir.

Q. What branch of the service?

A. United States Navy Seabees.

* * * * *

Q. (By Mr. Poth): What experience have you had with rigging in the Navy and since you've been out?

A. Well, I've been experienced with rigging on ships ever since I started longshoring, for the past twenty-eight years.

Q. Were you ever employed by the Navy?

A. Employed by the Navy?

Q. Yes.

A. I was in the Navy Seabees during the war.

Q. What are the duties of a foreman aboard a ship?

A. Well, to see that the gear is rigged properly and the cargo is stowed properly and discharged properly, see that the hatches are all secured for

(Testimony of Robert L. Peters, Jr.)

sea in the proper manner, discharging and hiring men, and overseeing the equipment.

Q. Now, were you employed aboard the P & T Adventurer on the night of July 14th and the morning of July 15th, 1956? [8] A. Yes, sir.

Q. And in what capacity were you employed aboard that ship?

A. I was the foreman in charge of some of the gangs. There were two other foremen aboard the ship at the same time.

Q. Now referring to the number two hatch of that ship and the number two hold, what operation if any was being carried on there, if you know?

A. At the time of the accident, or——

Q. No, that night.

A. Well, we were discharging general cargo, and I think there was some pipe in the hatch.

Q. How was that handled?

A. Well, that's usually handled on cargo boards with a pair of wire spreaders, and it's stacked on the boards, then a tie rope put on them for safety and then hoisted to the dock.

The Court: Will you explain the spreaders, Captain, the spreaders, so that the jurors will know what you are speaking of?

A. Well, the wire spreaders are four pieces of wire into usually a ring or a shackle, and they have a board across the bottom that hooks in the end of the cargo boards that they do the hoisting with.

Q. (By Mr. Poth): Now, where is the first place of rest of that cargo? [9]

(Testimony of Robert L. Peters, Jr.)

A. Oh, that would be on the dock where it's stowed.

Q. Would it be at the side of the ship where it's disconnected from the ship's tackle?

A. No. I believe the first place of rest is where it's piled on the dock.

Q. Now, who, if you know, was in charge of transporting the cargo from the ship to its first place of rest on the dock in connection with the number two hatch of that ship on that night?

A. Well, that would be Mr. Cordray on that specific ship.

Q. What were his duties, if you know?

A. He was the dock foreman in charge of the bull drivers that take the cargo away from the ship and stack it on the dock, and also to put whatever steel cars we may need under the hooks.

Q. Put cars under the hooks?

A. When we're discharging steel direct to cars it's his job to see that they are put in the proper place.

Q. Now, are you familiar with the custom and practice in respect to dock foremen, particularly in regard to going aboard a vessel on which they are handling cargo?

A. Well, yes, the dock foreman does come aboard at different times to get information from the foreman in charge of the ship as to what you're going to do with the gangs or if you're going to shift from one hatch to the other [10] or if you're going to lay them off at eleven o'clock or midnight

(Testimony of Robert L. Peters, Jr.)

or five in the morning. He has to come aboard to get that information.

Q. Is that a regular custom and practice?

A. Yes, sir, it is.

Q. Here in the Port of Seattle?

A. Yes, sir.

Q. How many times have you worked at Pier 48?

A. Oh, quite often.

Q. Over how long a period of time?

A. In the past eight years I'd say probably maybe two or three nights a week.

Q. And have you observed whether or not it is a custom and practice for dock foremen to go aboard ships discharging cargo at Pier 48?

A. Yes, they do.

Q. And what is the actual reasons that they go aboard?

A. Well, there's several different reasons why they go aboard. A lot of times they go aboard to see what type of cargo is in the hatch, whether they need railroad cars, or to find out from the ship's foreman what he's going to do and what kind of cargo is coming out so he'll know where to put it on the dock and how to stack it. There's several reasons for them to come aboard the ship. [11]

Q. Now, do you recall Mr. Cordray coming aboard the P & T Adventurer at Pier 48 on the morning of July 15th, 1956?

A. Yes, I do.

Q. About what time was it he came aboard to the best of your recollection?

(Testimony of Robert L. Peters, Jr.)

A. Oh, I'd say about ten minutes of five in the morning.

Q. And what conversation did you have with him, if any?

A. Well, he came up and stood alongside of me on the deck right opposite the hatch and he asked me what I was going to do with the gang, so that he would know whether to lay his bull driver off or whether to keep him. A lot of times when we're finishing a ship like that we may cover one hatch and then put a gang into another hatch to load dunnage or ship's gear or whatever might be there to load. The first gang that finishes usually jumps from one hatch to the other to clean up different items that have to be done.

Q. And whereabouts were you and he on the P & T Adventurer when you had this conversation?

A. We were standing just abreast of number two hatch on the starboard side.

Q. And what then happened, if anything?

A. Well, at that particular time just as he started to question me as to what we were going to do with the gang, we were winging in the gear to get it inside so we could [12] shift the gang to another hatch.

Q. All right, and then what happened?

A. During that conversation while he was asking me what I was going to do with the gang the boom was wung in over the edge of the ship and the block on the tent gantline dropped and hit him on the side of the neck and the head.

(Testimony of Robert L. Peters, Jr.)

Q. Now, this tent gantline block that you mentioned, is that a regular part of the ship's gear, tackle and equipment?

A. Yes, it is, on most all ships. Some ships do not have them because they don't use hatch tents. That's to hang a hatch tent in the event of rain or any bad weather to keep the cargo dry.

Q. Is that a permanent fixture on those P & T boats?

A. It is permanent when it is put on there, yes. They leave it there.

Q. And what use are they put to, these tent gantline blocks?

A. Well, them tent gantlines are made for hanging what they call a hatch tent. It covers the whole entire hatch, and it has a slot in the top of it for the fall to run back and forth, to keep the water from going down in the hatch on the cargo, and they are hung up there with two tent gantlines, one on each boom. The gantline is made fast to the forward part of the tent and the other part is made fast to the rail on the ship [13] when it's raised into the air, then it's lashed all around the bottom of the hatch so that no water can run in.

Q. How close to you was Mr. Cordray standing?

A. Right alongside of me.

* * * * *

Q. (By Mr. Poth): Well, I'll ask, standing where you and Mr. Cordray were at the time of this accident, and assuming normal conditions, what possible peril would you as an experienced foreman

(Testimony of Robert L. Peters, Jr.)

and rigger expect to be in, being where you were?

A. Well, I wouldn't be in any peril there.

Q. Why?

A. We're under the gear all the time. The gear is wung out across the deck so that it reaches the dock and you're walking back and forth under it all night long. There's no way possible that you can help from walking under it.

Q. Now, what business did you have there at the number two hatch? What were you doing, if anything? [14]

A. Well, at that particular time I was there to tell them to cover the hatch up and to wing in that gear, secure it for sea.

Q. Now, this boom that was being winged in, I wonder if you could describe briefly to us the various items of tackle that were attached to it and how they were secured?

A. Well, on the head of the boom they have what they call a gin block, and the fall runs down through that to the hook which does the hoisting. That fall is attached to a winch on the deck. There's a similar fall on each winch for each separate boom, and on the head of the boom there's what they call a preventer wire, and there's also a double rope guy, and on each boom there is this tent gantline, and when we wing the boom out and spot it for where we want to work in the hatch, the forward or after end or amidship, wherever it might be, then we secure that rope guy first.

(Testimony of Robert L. Peters, Jr.)

Q. What rope guy? Is that the steam schooner guy?

A. It's the rope guy that's on the boom, on the head of the boom. The steam schooner guy runs ahead of both booms. First we spot the boom and we spot that guy on the yard boom. That's the boom that goes out over the side of the ship to the dock. Then we secure the preventer wire. Then a man stands by that rope guy that [15] we have first secured and we hook the hook into a pad eye on the deck and we set tight on that winch so that that rope guy is tight and the preventer wire and the guy is taking the same strain. We set one boom at a time. When that's done on the yard boom we go across and do the same thing to the amidship boom, which sometimes hangs in the middle of the deck, sometimes it might hang in the middle of the hatch or sometimes it may be winged out offshore over the water, depending on what you're going to work. If you're working cargo in the hold you usually put it over the middle of the deck. If you're working lumber or logs you put it over the side of the ship so that you can reach both sides of the deck.

Q. Now, how was the gantline block, or the tent gantline line secured?

A. Well, we usually don't secure them if we're not using a tent, which we weren't doing that night.

Q. All right.

A. We put the guy rope on the bit and we usually secure the preventer wire to another bit, but if there's none available we put the preventer wire on

(Testimony of Robert L. Peters, Jr.)

top of that. Sometimes the gantline is just hung over a stay; sometimes it may be secured with one wrap around that bit just to keep it from flopping into the fall when a load [16] is coming up, but when you use a tent it's definitely secured to the deck.

Q. Yes. Where is the block suspended from?

A. The gantline block?

Q. The tent gantline block, where does that hang from?

A. The tent gantline block usually hangs off of the end of the boom about six feet, five to six feet. It has a strap shackled in both ends of it. The strap runs from the head of the boom to the tent gantline block, which usually is a wooden block.

Q. Now I'll ask you whether or not you were supervising at the number two hatch at the time of this accident?

A. Yes, I was.

Q. Now, can you tell us whether or not the preventer had been released, let go?

A. Yes, it was.

Q. What is the purpose of a preventer?

A. Well, the purpose of a wire preventer is in the event that you're taking a heavy load, a lot of times you can't tell whether a load is too heavy for the gear or not. You may run into something that's mismarked on the weight or something like that. If the wire rope on the guy carries away there's a chance that the preventer wire will hold it so that you will not tear the boom down and that you don't drop the load and hurt [17] anybody.

(Testimony of Robert L. Peters, Jr.)

Q. Now, you mentioned a rope guy that was also attached to that boom? A. That's right.

Q. What's the name of that rope guy?

A. Well, they just call that the rope guy.

Q. All right. And what is the purpose of that rope guy?

A. That guy is put there to hold the boom out where you want it, whatever position you want the boom in, and they also have an amidship guy that runs from the top of one boom to the top of the other boom, and when you set your two booms like that where you want them, then you set tight on the midship guy and then nothing can move one way or the other. It becomes stationary.

Q. Did you check to see that the rope guy was let go? A. Yes, sir.

* * * * *

Q. (By Mr. Poth): Was it let go?

A. Yes, it was let go.

Q. Did you see that it was let go under your supervision? [18] A. Yes, sir.

Q. Now I'll ask you, was the tent gantline rope secured anywhere at the time that this boom was being winged in? A. No, sir.

Q. What was its condition as you saw it?

A. It was all slack laying on the deck.

Q. Now, did you inspect this tent gantline block after it fell on Mr. Cordray? A. Yes, I did.

Q. Would you please describe to us what you saw?

A. Well, there was roughly about two foot of

(Testimony of Robert L. Peters, Jr.)

strap left on there and it was all rusted where it broke. There wasn't much of a core left in it. I looked at it and then somebody on the dock hol-lered they wanted to see it, some safety man, and I picked it up and threw it on the dock to him.

Q. And then what happened to it, if you know?

A. Well, shortly after that, within five minutes or so, the mate came down. I don't know whether he was the chief mate or the second mate, and he wanted to know what happened to the block and the strap that let go, so I told him, "I threw it out on the dock for the safety man to look at," and he went out and picked it up and brought it back aboard the ship.

Q. Did you ever see it again? [19]

A. No, sir.

Q. Did you make an investigation of this accident afterwards, the cause of the falling of this——

A. No, I didn't.

Q. Well, I'll ask you this: Were you able to determine from your own observation there that night and your experience as a rigger and stevedore foreman and longshoreman the cause of the falling of that block?

* * * * *

A. Well, I could give my opinion as to why it fell. [20]

* * * * *

ROBERT L. PETERS, JR.

(resumed the stand)

The Court: You may resume the interrogation.

Direct Examination—(Continued)

Q. (By Mr. Poth): Mr. Peters, after the tent gantline block fell to the [80] deck of the ship striking Mr. Cordray, what if anything was done with the gantline rope that went through the block?

A. That was taken out of the block by the hatch tender.

Q. Did he cut the rope?

A. No. It has two loose ends on it. There's no need of cutting it. It just simply pulls through the block.

Q. You saw him pull it through the block?

A. Oh, yes.

Q. And what was his purpose for doing that?

The Court: If you could observe what appeared to be his purpose.

Mr. Poth: Yes.

Q. (By Mr. Poth): What appeared to be his purpose?

A. The reason he pulled it out of the block was the safety man on the dock wanted to look at that block, and I told him to pull it out so I could throw the block on the dock. I threw the block some thirty feet from the deck of the ship out onto the dock in through the doorway.

Q. Did you throw the rope with it?

A. Pardon?

Q. Did you throw the rope with it?

(Testimony of Robert L. Peters, Jr.)

A. Oh, no, you couldn't throw the rope with it, it's too long a rope. It's a three and a half inch rope. [81]

The Court: Did you throw with it that part of that wire cable or line or gantline? Did you throw with the block any part of that line that you see there?

A. Yes, there was a wire on the block when I threw it on the dock.

The Court: How did it look as compared with that piece of line which now appears to be engaged in the block?

A. Well, the one that I saw, the one I threw on the dock, the lay was not out of the line, it was all laid in the way it should be and it didn't have no core in it, and the end of that where that's cut off there was completely rusted. I broke the ends off myself with my fingers.

The Court: You may inquire.

Q. (By Mr. Poth): During recess you've had an opportunity of examining this block?

A. Yes, I have.

* * * * *

Mr. Poth: Yes, sir.

Q. (By Mr. Poth): Did you have occasion of examining this block and pennant during recess?

A. Yes, I did.

Q. And was today the first day that you saw it?

A. Since the accident, yes.

Mr. Poth: If the Court will permit, I would like to have the witness view it.

The Court: That will be done.

(Testimony of Robert L. Peters, Jr.)

(Defendant's Exhibit No. A-4 was placed before the witness.)

Mr. Poth: If the Court would permit, I would like to have the witness examine the ends of the wire on the pennant.

The Witness: I have examined them before.

The Court: Examine the wire and the ends of the wire and the block and everything about that thing which you now have on the witness chair's reading desk in front of the chair you are occupying, and be prepared to answer questions about. That exhibit number is——

Q. (By Mr. Poth): Have you in your experience——

The Court: Has that a number?

Mr. Howard: A-4, Your Honor.

Q. (By Mr. Poth): Have you in your experience as a stevedore foreman personally observed the falling of tent gantline blocks?

A. Yes, I have.

Q. On how many occasions? [83]

A. Oh, I'd say possibly three or four occasions in the past eight years.

* * * * *

Q. (By Mr. Poth): Have you had experience with tent gantline blocks before?

A. Yes, sir. [84]

Q. Over how long a period of years?

A. Oh, practically all the time I've been longshoring.

(Testimony of Robert L. Peters, Jr.)

The Court: State in words how many years, about.

A. Well, I'd say roughly about twenty-eight years.

Q. (By Mr. Poth): And when you were in the Navy did you have any particular duties that required you to have experience with tent gantline blocks?

A. Yes, sir. I was stevedore officer in the Navy.

Q. And where did you serve in the Navy?

A. In the South Pacific, Seabee Battalion.

Q. And what were your particular duties as stevedore officer?

The Court: With respect to gantline blocks.

Q. (By Mr. Poth): With respect to gantline blocks.

A. I was in charge of all of the rigging on all of the ships that discharged at Manus Island, discharged——

The Court: Will you spell the name of that island, please? A. Manus, M-a-n-u-s.

The Court: Is that in the Southwest Pacific?

A. It's in the Admiralties.

The Court: Where?

A. Admiralty Islands. [85]

The Court: Where are they?

A. That's the Southwest Pacific.

The Court: You may inquire.

Q. (By Mr. Poth): And did you observe any tent gantline blocks fall while you were in the Navy?

(Testimony of Robert L. Peters, Jr.)

A. Yes, just one that I know of.

Q. And have you observed any tent gantline blocks fall since you've been out of the Navy and been working in a civilian capacity?

A. Yes, I have.

* * * * *

Q. (By Mr. Poth): Well, I might ask you, are you familiar with the causes of tent gantline blocks falling? A. Yes, I am.

Q. And what are those causes?

A. Well, there's several causes.

Q. What are they?

A. Well, one, a strap similar to this could get pinched in the block. Another thing, it could chafe when the boom is topped up into the sockets or laid down in the sockets, it could be laying under the boom so that when the boom is working all the time it could chafe through [86] there at any given spot.

Q. Would that be while the vessel is at sea?

A. Yes, mostly, due to chaffing.

Q. And what other causes have you experienced and observed of tent gantline blocks falling?

A. Well, I have seen one fall when we just started to raise a tent, a hatch tent; by just pulling the rope through the block it just fell right onto the deck, because it was rusted completely through.

Q. Now, did you have occasion to observe the tent gantline block that fell on the morning of the 15th of July, 1956? A. Yes, I did.

(Testimony of Robert L. Peters, Jr.)

Q. And what was its condition as to the strap as you observed it?

A. Well, this end of the strap here was completely rusted through. I broke the rusted ends off with my fingers, and it had no core here at all in the block, in the strap. The core was all pulverized. It just fell apart.

Q. Does that strap there have the same appearance as the strap that you saw aboard the P & T Adventurer? A. No, it don't.

Q. How is it different, if it is different?

A. Well, this strap here has a core, a solid core I'd say, and the ends of this strap here have been beat or chiseled or something, and there's no rust at all on [87] them that I can see.

Q. All right. Please describe the ends of the wires as you see them there.

A. As they are here now?

Q. As they are there now.

A. Well, they look to me like it's been chopped off or beat with a hammer or something.

Q. Why do you say that?

A. Well, just by the look of them.

Q. Well, tell us——

A. If the strap was rusted through it wouldn't be like this, you would see rust all the way through it here and you would be able to break them off. This is all live wire. There's nothing dead to this strap at all.

Q. All right. Describe the ends there, the actual appearance of the ends, the shape of them.

(Testimony of Robert L. Peters, Jr.)

A. Well, they are jagged here and they are shiny. I don't see no rust on them, compared to the strap that I looked at that I threw overboard.

Q. You mentioned that they look as if they had been pounded. What evidence of pounding do you see, or hammering?

A. Well, as I say, they could have been hammered, or maybe that's caused from——

The Court: He wants you to describe the condition that you see there which makes you state your [88] attitude in the comment Counsel quoted from your former statement.

A. Well, this looks to me like it could be chafed. It could be chafed under a boom or something to cause that shinyness and that pounding on the end.

Q. (By Mr. Poth): Please, I want you to describe the exact shape of the ends of the different ones there. By "shape" I mean whether they are flattened, whether they are elongated.

A. Well, some of them are.

Q. Whether they are squarely broken off, just describe what you see.

A. Oh, some of them are flattened here and some are stranded, some are longer than others.

The Court: It is the individual piece of wire that you are looking at at the moment, not the composite of a number of pieces of wire that Counsel inquires of you concerning the condition as stated in his question. It is the condition as to a single piece of wire that is a component, the irreducible unit that is a component of the cable or the wire

(Testimony of Robert L. Peters, Jr.)

rope or whatever it is that is engaged with that block, Defendant's Exhibit A-4. [89]

* * * * *

Q. (By Mr. Poth): I believe you mentioned a flattened shiny end. Now would you take ahold of one of those flattened shiny ends at this point? Do you have one of them there? A. Yes, I do.

Q. Now describe exactly the appearance as you see it.

A. Well, the end is flattened down and it's shiny on this one strand of wire here, as though it might have been beat down.

Q. All right. What normally happens when wire breaks under strain in regards to appearance afterwards? Is it flattened and shiny like that?

A. No, it's not.

Q. Or is it broke off or elongated? Tell us exactly what it looks like in your experience when it's broke off by strain.

A. It would just be broken off and shredded. You wouldn't have no beat shiny ends like is on that wire there. [90]

Q. Now, the wire that you saw there that morning, did that have any beat shiny ends on it?

A. No, it didn't. It was completely rusted through. I broke ends of that off with my finger.

Q. Did you see the mate there that morning?

A. Yes, I did.

Q. Did you have any conversation with him?

A. Yes, I did.

(Testimony of Robert L. Peters, Jr.)

Q. And how long after the accident happened did he get there?

A. I would say just a few minutes, probably three or four minutes after the accident.

Q. And what conversation did you have with him?

A. The mate came down on the deck and he said, "Pete, what happened?" I said, "The tent gantline block fell." "Well," he said, "Where is it?" I said, "It's out there on the dock. I threw it out so the safety man could look at it," and he immediately went out on the dock and picked it up and brought it back aboard the ship.

Q. Now, where was the tent gantline line at that time when he came up to you?

A. It was laying on the deck at the after end of number two hatch.

Q. Was any part of it on the dock?

A. No, it wasn't. The hatch tender took it out of the [91] block and laid it on the deck. He just pulled the end right out of the block.

Q. Now, was any end of that attached anywhere?

A. No, it wasn't. We had let go of it to wing the boom in.

Q. Where was it secured originally?

A. It was secured on the bit on the bull rail.

Q. What else was secured on that bit, if anything?

A. The guy and the preventer.

Q. All right, and what was on—would you recall in what order they were secured on this bit?

(Testimony of Robert L. Peters, Jr.)

A. Well, normally you secure the guy first, then you put your preventer on and secure that, and then you slack the guy in to the preventer until you set the preventer tight, so the preventer would be on top of the guy and then your gantline would have a half a turn on top of that, just to hold her from swinging back and forth.

Q. Would it be necessary in order to let the preventer go that you first let go the tent gantline?

A. Yes.

Q. Why?

A. Because it's on top of it. When you put the preventer on the bit you take three or four turns and then you take a rope and you mouse the two top turns together, and if the gantline was on top of that you couldn't get that mousing off unless you let the gantline go. [92]

Q. Now, when this mate took this block did you see him put any mark or identification on it?

A. No, he just picked it up and carried it back aboard the ship, and that's the last I have seen the mate or the block.

* * * * *

Q. (By Mr. Poth): Well, I'll ask you in what ways could that flattening effect have occurred aboard the ship?

A. Well, as I said before, it could have been chaffing under the boom when the booms were secured, and another thing——

Q. Secured for what?

A. When they secure the booms to go to sea.

(Testimony of Robert L. Peters, Jr.)

Sometimes they stop them straight up into the air and set them into a collar, and their guy and preventer and this strap would be inside of that collar in back of the boom. They secure all the lashing right in with it. Other times [93] if they figure it's going to be——

Q. Just one minute on that. What is that collar made out of?

A. It's a steel collar. It opens up half way.

Q. And how could that collar cause that flattening effect?

A. Well, the boom would have a tendency to work in there when the ship is rolling and it would chafe back and forth on the edge of that collar.

Mr. Poth: I have no further questions.

The Court: You may inquire.

Cross Examination

Q. (By Mr. Howard): Mr. Peters, by whom were you employed on July 15, 1956?

A. Seattle Stevedore Company.

Q. And what was your title, your position?

A. Foreman, ship's foreman.

Q. Ship's foreman, otherwise known as a stevedore foreman?

A. Stevedore foreman, yes, sir.

Q. And exactly what was the extent of your duties as stevedore foreman?

A. My duties as a stevedore foreman is to see that the gangs are properly placed in the hatches,

(Testimony of Robert L. Peters, Jr.)

that the gear is rigged in a proper manner, the ship is uncovered in a safe and proper manner and the proper handling of [94] discharging and loading of the cargo, of any types of cargo.

Q. All of that relates to operations performed by longshoremen aboard the ship?

A. Yes, sir.

Q. And all of the longshoremen employed aboard the ship would be acting under your supervision and direction as stevedore foreman?

A. Well, not all of them, because I believe that night there were three foremen on there.

Q. Well, all of them at this hatch, let us say.

A. Yes, that would be true.

Q. At Hatch No. 2? A. Yes.

Q. In other words, you were in charge of the rigging and the trimming of the booms, and so forth, at that hatch?

A. When we start the ship.

Q. When you start it? A. Yes.

Q. And I think you mentioned in describing your duties that you had to be satisfied that everything was in a proper condition to go ahead with your work? A. That's right.

Q. And did you do so?

A. Well, I did not come aboard this particular ship the [95] night that the gangs first started and rigged the gear I was working a ship on the opposite side of the dock.

Q. I see.

(Testimony of Robert L. Peters, Jr.)

A. And I came aboard this ship the night that the ship finished.

Q. That was the first night, then, that you had worked on the ship? A. Yes, sir.

Q. And as I understand, then, you didn't check to see if the gear was in proper condition?

A. Yes, I did. I always check the gear when I come aboard.

Q. And were you satisfied with the condition of the rigging? A. Yes, I was.

Q. Now, you knew Mr. Cordray before this accident, did you not?

A. Yes, I knew him as an employee on the waterfront.

Q. What position did he occupy that night or early that morning?

A. He was the dock foreman.

Q. And you were the stevedore foreman on the ship and Mr. Cordray was the dock foreman, is that correct? A. That's right, yes, sir.

Q. And what duties did Mr. Cordray have as distinguished from your duties as a stevedore foreman? A. What duties does he have? [96]

Q. Yes.

A. He has charge of the bull drivers. They usually work one bull driver to each hatch who picks up the cargo when we set it on the dock and takes it into the shed and stacks it in piles.

Q. In other words, all the duties that Mr. Cordray had to perform related to the handling and the

(Testimony of Robert L. Peters, Jr.)

movement of the cargo on the dock, is that not correct?

A. Well, no, he has other duties, too. He has duties of putting steel cars under the hooks when we want them.

Q. That's on the dock?

A. On the dock, yes.

Q. Let's put it another way, Mr. Peters. Did Mr. Cordray have any duties or responsibilities in connection with the handling or movement of cargo off the ship?

A. Yes.

Q. Aboard the ship?

A. Yes.

Q. And what duties were those?

A. Well, when the cargo comes from the ship to the dock, that's his duty to take care of it. He has to know——

Q. On the dock?

A. Yes, to move it on the dock, but he has to know what is coming out of that certain hatch at a certain time to coordinate the movement of the cargo in these steel cars [97] that we use.

Q. I understand, but what I want to be sure I understand also is that Mr. Cordray had no duties or responsibility in connection with the work being done by longshoremen employed by Seattle Stevedore Company working aboard that vessel that night.

* * * * *

A. His duties were on the dock and also to get these cars put under the hook, but he was not in

(Testimony of Robert L. Peters, Jr.)

complete charge of the foreman working aboard the ship in the holds. That was my ship.

Q. (By Mr. Howard): As a matter of fact, Mr. Cordray was employed by Olympic Steamship Company?

A. That's right.

Q. The dock operator, and you were employed by Seattle Stevedore Company?

A. That's right.

Q. A different employer?

A. That's correct.

Q. Did Mr. Cordray have anything at all to do with the trimming and the rigging of the cargo-handling gear aboard the ship? [98]

A. No, sir.

Q. Or did he have anything to do with directing the longshoremen down in the hold as to how they would bring that cargo out?

A. No, sir.

Q. Or the hatch tender or the winch driver who would be handling the cargo up on deck?

A. No, sir.

Q. Or the sling men—who are the sling men, incidentally?

A. The sling men are the two men that work with the gang on the dock at each hatch.

Q. They are also employed by Seattle Stevedore Company, are they not?

A. They belong to that gang that's working in the hatch.

Q. That's right, and they are under your supervision as stevedore foreman?

A. That's right.

Q. What do they do, incidentally, Mr. Peters?

(Testimony of Robert L. Peters, Jr.)

A. They land and load all of the cargo coming off or going on. If it's loading steel, they sling it up and hook onto it onto the hook and we hoist it in. If it's coming out, they land it on the dock and send the boards back in again.

Q. Let's just limit this now to cargo coming off the ship. That's what we're concerned with, cargo coming off the [99] ship. A. All right.

Q. When the cargo comes off the ship it is lifted by the ship's cargo-handling gear, is it not?

A. That's right.

Q. And it is brought over by the cables, slings around the pallet boards of cargo, and it is deposited on the apron of the dock, is it not?

A. That's right.

Q. And then what do those sling men do?

A. They let go of it.

Q. O. K.

A. They take the slings off, or straps or rope slings or whatever it may be, and let go of it. If they are using boards, they let go of the board and they hook up a new board empty and send it back in again.

Q. And all of that is done by longshoremen under your employment? A. That's right.

Q. Mr. Cordray has nothing to do with that, does he? A. No.

Q. All right. Now, you spoke yesterday in your testimony about the meaning of the term "first place of rest". That is a technical term, is it not,

(Testimony of Robert L. Peters, Jr.)

that is used in connection with the determination of rates, and so forth? [100]

A. Well, it's a little technical, but I think it more or less comes under the truckmen's union.

Q. Yes.

A. They have something to do with it. The first place of rest is where it's taken off of the boat on the dock.

Q. Yes. A. That's the proper——

Q. Mr. Peters, in reality the first place of rest of that cargo when it comes out of the hold of the ship is where it is deposited on the dock while still attached to the ship's cargo-handling gear, is it not?

A. No, that's not true.

Q. Does the pallet of cargo not stop movement at that point?

A. Yes, it stops movement.

Q. And that is where the stevedores' responsibility ends in connection with the cargo, is it not?

A. No, no, no.

Q. When the slings are detached? When does the stevedores' responsibility end?

A. At the first place of rest on the dock when the cargo is taken—the cargo is landed from the hatch onto the dock.

Q. Yes.

A. It's picked up by the bull driver and taken into say the middle of this room and stacked up five or six boards [101] high.

Q. Now, Mr.——

A. Maybe two days later it's taken and moved

(Testimony of Robert L. Peters, Jr.)

fifty feet up forward and taken off of the board and placed on the dock. That's the first place of rest.

Q. But did the Seattle Stevedore Company, your employer, at the time of this accident do the work from the time that pallet or cargo board was brought over the side of the ship and comes to rest on the dock? Does Seattle Stevedore Company do any more work with that cargo?

A. Well, at times they do. Sometimes they do the dock work, too.

Q. I'm talking about July 15, 1956, at Pier 48 in Seattle.

A. The Olympic Steam had the dock that night.

Q. So that your responsibility with respect to that cargo ended at that time, did it not?

A. No, I wouldn't say that. The stevedore company's responsibility don't end when it touches the dock. They are still responsible for that cargo until it's taken off of the boards.

Q. Well, until——

A. They may sublet that to Olympic Steam or to John Jones or anybody else to do that for them.

Q. Do you know what the arrangement was at that time?

A. No, I don't know what the arrangement was. I know that [102] the Olympic Steamship Company hired the dock bull drivers, I know that.

Q. Yes, and they were doing the work from the time the cargo reached that point, where the slings deposited it on the dock, they did the rest of the work, did they not?

(Testimony of Robert L. Peters, Jr.)

A. From there on, yes.

* * * * *

Q. (By Mr. Howard): At the time this load of cargo was brought over the side of the ship and landed on the dock, what would the sling men do with respect to the cargo?

A. When we were taking a load out of the ship?

Q. Yes.

A. They would let go of it, as I say, if it was on boards, and hook on another empty board and send it back in.

Q. Now, these lift truck drivers or bull drivers that you referred to, who were they employed by?

A. Olympic Steamship.

Q. I believe you testified yesterday, Mr. Peters, that it was customary for dock foremen to come aboard a ship [103] such as the P & T Adventurer.

A. Yes, it is.

Q. Now I'll ask you, Mr. Peters, if it isn't also customary for shipyard repairmen to come aboard the ship?

A. Yes, it is.

Q. As for example employees of Todd Shipyards or Puget Sound Bridge and Dredge?

A. They do it all the time.

Q. Yes, and from — you've been on the waterfront many years, haven't you?

A. Yes, sir.

Q. It is also customary for Customs officers or Immigration officers to come aboard the ship from time to time, is it not?

A. At all times they do.

Q. Yes. And it's not uncommon for representa-

(Testimony of Robert L. Peters, Jr.)

tives of the cargo interests to come aboard the ship from time to time, isn't that true?

A. That's right.

Q. Do surveyors come aboard sometimes?

A. That's right.

Q. For what purpose?

A. To survey the cargo and see if it's properly stowed.

Q. To look at the cargo and see how it's stowed, isn't that right? [104] A. That's right.

Q. I'll ask you if it's not also common practice for guests of the officers or some of the crew members to come aboard from time to time?

A. They're not supposed to, but they do.

Q. They do come aboard. Is it also——

A. If they happen to get by the watchman.

Q. Is it also a common practice for deliverymen to deliver supplies, perhaps bring supplies or materials aboard the ship?

A. No. That's delivered to the dock, period.

Q. Then the longshoremen take over?

A. That's right. Sometimes the sailors take over.

Q. Sometimes the which?

A. The sailors take over and load it.

Q. The seamen. Suppose someone had just a little package of some kind; they might deliver that right aboard the ship, wouldn't they?

A. They'd come to the gangway and give it to the watchman. He's not allowed aboard the ship.

Q. Suppose someone representing a ship supply outfit, Sunde & d'Evers, or some meat company or

(Testimony of Robert L. Peters, Jr.)

somebody like that came down, they would be allowed aboard the ship, would they not?

A. No, I don't think they let them aboard the ship. [105]

Q. Do they talk with the ship's steward?

A. I think they talk with the steward out in the office on the dock.

Q. Oh. Now let's get to this dock office. What office are you referring to?

A. Oh, there's several offices on the docks there.

Q. Is there an office that you use on the dock?

A. No.

Q. Is there an office there with a phone provided and a desk, and so forth, that you occasionally use?

A. There is an office that can be used, yes.

Q. Who does use that office?

A. Well, I've seen checkers use it. Some of the foremen use it to write their time in.

Q. Some of the dock foremen use it?

A. Some of the dock foremen use it, yes.

Q. Some of the stevedore foremen use it too, don't they?

A. That's right.

Q. Sometimes the supercargo uses it?

A. Yes.

Q. As a matter of fact that's the purpose of the office, is to have a place where they can meet together to exchange their instructions and to coordinate their activities, isn't that true?

A. Well, they have to have some office, yes.

Q. Yes. Where is that office located, incidentally?

(Testimony of Robert L. Peters, Jr.)

A. Well, on Pier 48 there's one, two, three of them. There's two just inside of the main door, and there's one about half way down the dock.

Q. Had you used that office on the night that this accident occurred? A. No, I hadn't.

Q. You had never been out there in that office that night? A. No.

Q. What time of the night or morning did this accident occur, Mr. Peters?

A. I'd say about ten minutes of five.

Q. And at that time you were at number two hatch on the deck of the ship in charge of that particular operation, were you? A. That's right.

Q. That is the swinging in or the winging in of the boom? A. Yes, sir.

Q. You mentioned this afternoon that you had talked with the mate after this accident. Do you know the name of the mate?

A. No, I don't know his name, no.

Q. Did you know a Captain Jack Harris?

A. No, I don't recall that name at all.

Q. Did you see a man here this morning that testified before [107] you by the name of Harris?

A. No, I didn't see him.

Q. You don't know whether that's the man you refer to?

A. I didn't see him in the courtroom.

* * * * *

Q. (By Mr. Howard): Was the mate that you talked to one of the regular mates of the ship or was he a relief or night mate?

(Testimony of Robert L. Peters, Jr.)

A. No, I believe he was the regular mate.

Q. I see.

A. He's been on them ships quite some time.

Q. Do you recall in your conversation with this mate having told the mate that you were not an eye witness to the accident?

A. Pardon?

Q. Do you recall having told the mate that you talked with immediately following the accident that you were not an eye witness, that you did not see the accident?

A. No, I did not tell him that because I was standing right there when it happened.

Q. Now, yesterday, Mr. Peters, I understood you to testify [108] that the hatch tent gantline was not usually secured on the ship.

A. That's right.

Q. Do I understand your testimony to be that it was secured on this occasion?

A. When the gantline is being used to hang a tent, you secure it.

Q. Well, this——

A. When you don't use it to hang a tent you might just take a single wrap around a bit or anything to hold it from swinging in the way of the fall.

Q. All right. Now let's——

A. When I say "secured", I mean made fast.

Q. All right. Let's refer to this night of July 14th and 15th, the morning of July 15th. Was the hatch tent gantline at number two on the starboard

(Testimony of Robert L. Peters, Jr.)

boom secured or wrapped around anything, made fast in any way?

A. Yes, it was made fast on the bit on top of the preventer.

Q. I see. And when was it released from there?

A. When was it relieved?

Q. Released.

A. Released. When we went to wing the gear in.

Q. Who did that? A. The stevedores.

Q. Who? [109]

A. Well, I couldn't tell you his name. That's the stevedore's job that works in the hold, to come on deck and let go of them lines and hook the cargo hook in on the offshore side so that they can wing the boom in.

Q. I take it you——

A. And one man stands by that rope to slack it off.

Q. You don't know who did it?

A. No, I don't. I couldn't tell you exactly which man done it, no.

Q. Did you see him do it?

A. Yes, I did. I told him to do it.

Q. And how long was that before the block fell?

A. Well, the block didn't fall until after the boom had swung in over the side of the ship.

Q. Was there any strain on that hatch tent gantline before it was released from this point that you claim that it was secured on the bit?

A. No.

Q. No strain. Was there any slack in it?

(Testimony of Robert L. Peters, Jr.)

A. Yes, there was a little slack in it. It wasn't set right up tight, it just had a couple of turns around the cleat.

Q. There had been no hatch tent used there that night, had there?

A. Not to my knowledge—not that night there wasn't, no. [110] They might have used them before that.

Q. Why was it secured around that bit if there was no hatch tent in use?

A. To keep it out of the way of the fall. That hangs directly under the fall, and if you don't pull it back to the side or forward or some place and take a turn around so it will stay there, it will chafe on that fall. The rope itself hanging down, the two parts will be in the way of the cargo coming up.

Q. Did you ever see around the time of this accident, did you ever see the lower part of the hatch tent gantline wrapped around a shroud?

A. No, sir, it was not wrapped in a shroud.

Q. After the accident did you check to see if it was wrapped around a shroud?

A. That's right.

Q. And you didn't see that?

A. The hatch tender pulled it out of the block and laid it on the deck so that I could throw the block overboard.

Q. Now, at the end of Mr. Poth's examination you described a flattening effect on this wire, and then you testified that might have been caused by chafing under the boom on the steel collar when the

(Testimony of Robert L. Peters, Jr.)

boom is topped, but I understand that you checked that block and piece of wire immediately following the accident and you didn't observe [111] that condition, did you?

A. No, I did not. The wire I checked was all rusted completely through.

Mr. Howard: That's all.

The Court: Anything further?

Mr. Poth: No, I believe that's all.

* * * * *

(Witness excused.)

MARCIA INOUE

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Poth): Will you state your name, please? A. Marcia Inouye.

Q. And where do you live?

A. 326 18th Avenue.

Q. And what is your occupation? [28]

A. Assistant medical record librarian at Providence Hospital.

Q. And did you bring with you the hospital bill for Jack V. Cordray, the plaintiff in this action, for hospitalization in 1956?

A. Yes, I have it here. [29]

* * * * *

(Testimony of Marcia Inouye.)

(Plaintiff's Exhibit No. 1 for identification was examined by Mr. Howard, then handed to the witness.)

Q. (By Mr. Poth): Does that bill contain a true and correct statement of all the charges made by Providence Hospital to Jack V. Cordray for his said hospitalization? A. Yes, it is.

* * * * *

Mr. Poth: I'll offer it at this time.

Mr. Howard: No objection.

The Court: Admitted.

(Plaintiff's Exhibit No. 1 for identification was admitted in evidence.)

* * * * *

Q. (By Mr. Poth): What is the amount of that bill?

A. The hospitalization from August 28, 1956 to September 15, 1956 amounted to \$426.25, and there was a physiotherapy treatment dating from September 17, 1956 to January 1st, 1957, which was a balance of \$159.50.

The Court: What is the total of that bill? [30]

A. The total would be \$585.75.

* * * * *

GLEN J. SNODGRASS

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

The Court: State your name clearly and distinctly so all present can hear you.

(Testimony of Glen J. Snodgrass.)

A. Glen J. Snodgrass. [31]

* * * * *

Direct Examination * * * * *

Q. (By Mr. Poth): What is your occupation?

A. Office manager of the Swedish Hospital.

Q. In pursuance of your duties as office manager do you have under your control the records relating to the charges made by Swedish Hospital to Jack V. Cordray for hospitalization in the year 1956?

A. Yes, I do.

Q. Do you have that bill with you?

A. Yes. [32]

* * * * *

(Plaintiff's Exhibit No. 1 for identification was examined by Mr. Howard, then handed to the witness.)

Q. (By Mr. Poth): Does that bill contain a true and correct statement of all the charges made Jack V. Cordray by Swedish Hospital in 1956?

A. Yes, it does.

Mr. Poth: I'll offer it in evidence.

Mr. Howard: No objection.

The Court: Admitted.

(Plaintiff's Exhibit No. 1 for identification was admitted in evidence.)

Q. (By Mr. Poth): What is the amount of the bill?

A. \$96.45.

(Testimony of Glen J. Snodgrass.)

Q. And what period of hospitalization does it cover in time?

A. From July 15th to July 17th, 1956. [33]

* * * * *

The Court: The plaintiff's case in chief is interrupted to accommodate a witness for the defendant, and this witness now being called is called by the defendant to testify in the case in chief of the defendant. Will this witness come forward and be sworn.

JACK HARRIS

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Howard): Will you state your full name and address, residence address, please?

A. My name is Jack Harris.

Q. Your address?

A. 2079 17th Avenue, San Francisco.

Q. What is your employment at the present time, sir?

A. I'm Master of the steamship P & T Explorer.

Q. Where is that ship located now?

A. At Vancouver, Washington.

Q. And when is it due to sail? [34]

A. Three o'clock this afternoon.

The Court: The name is Explorer?

A. Explorer, yes, sir.

(Testimony of Jack Harris.)

Q. (By Mr. Howard): How long have you been employed by Pope & Talbot, Inc.?

A. Since 1942, which is fifteen years.

Q. And do you hold any licenses issued by the Coast Guard? A. Yes, sir.

Q. If so, what?

A. As Master of steam, any ocean, any tonnage.

Q. On July 15, 1956, will you state what your employment was as of that date?

A. I was second mate on the steamship P & T Adventurer.

Q. And where was that ship located on July 14th and July 15th? A. At Pear 48, Seattle.

Q. Do you recall an accident involving a Mr. Cordray which occurred on the early morning of July 15th? A. I do.

Q. Were you on duty at the time?

A. No, I was not on duty. I was called I believe at 4:30 a.m. as we were to shift the ship to Olympia at 5:00.

Q. What were you doing?

A. What's that?

Q. What were you doing at that time? [35]

A. Well, I got up and I had started the gyro compass the night before and I went in to check the gyro compass. Then I went down to have my cup of coffee.

Q. Where was the ship located at the time?

A. At Pier 48 in Seattle.

* * * * *

(Testimony of Jack Harris.)

Q. (By Mr. Howard): What if any operations were being performed on the ship in the early morning of July 15th?

A. They were discharging cargo.

Q. And where was the ship located?

A. Pier 48 in Seattle.

Q. Do you know who operates Pier 48?

A. I believe it's Olympic Steamship Company.

Q. Who was performing the stevedoring work on the ship at that time?

A. Seattle Stevedoring Company. [36]

* * * * *

(Chief Mate's Log was marked Defendant's Exhibit No. A-1 for identification.)

The Clerk: Defendant's Exhibit No. A-2.

(A photograph was marked Defendant's Exhibit No. A-2 for identification.)

The Clerk: Defendant's Exhibit No. A-3.

(A photograph was marked Defendant's Exhibit No. A-3 for identification.)

Q. (By Mr. Howard): Can you identify the book in front of you marked for identification as A-1?

A. Yes, sir. It's——

The Court: That is sufficient. Ask him another question.

Q. (By Mr. Howard): What is it?

A. It's the rough log book—no, this is the smooth log book.

The Court: Of what department of the ship, if any?

(Testimony of Jack Harris.)

A. The deck bridge log, or Chief Mate's Log as it is called.

Q. (By Mr. Howard): Does it include the period for July 10 to 15, 1956?

A. Yes, it does.

Q. And when are the entries made in that log book? [37]

A. Usually as they go along, usually every two or three hours, four hours. If anything unusual happens they are usually made right after the occurrence.

Q. By whom are the entries made?

A. By the mate on watch at the time.

Mr. Howard: I offer Exhibit A-1.

Mr. Poth: I have no objection.

The Court: It is admitted.

(Defendant's Exhibit No. A-1 for identification was admitted in evidence.)

[See pages 453-5.]

Q. (By Mr. Howard): Is there an entry in that Exhibit A-1 with reference to the incident involving the plaintiff, Mr. Cordray in this case?

A. Yes, there is.

Q. Will you turn to that, please.

The Court: If the place to which you do turn in response to this question has a page number, will you identify that?

A. Sunday, July 15, 1956.

Q. (By Mr. Howard): At what time does the entry appear?

(Testimony of Jack Harris.)

A. At about 4:50 a.m. It would be 0450. [38]

* * * * *

Q. (By Mr. Howard): That's 0450 a.m., is that correct?

A. Well, it doesn't say "a.m.", but "04"—the way we use it it's 0450.

The Court: What do you mean by that? Is it in the morning or afternoon or nighttime?

A. We use the 24 hour system.

The Court: I know, but what does that 0450 mean in so far as whether it is a.m. or p.m. or what it is?

A. It's a.m., sir.

The Court: Proceed.

Q. (By Mr. Howard): Now, handing you also what has been marked for identification as Defendant's Exhibits A-2 and A-3, can you identify those?

A. Yes, sir.

Q. And what are they?

A. They are pictures of the booms of the Adventurer. This one, A-2, is a picture of the number two starboard boom, and A-3 shows looking aft from the forecastle from number one hatch, looking aft on the starboard side.

Q. Are those pictures of the ship and of the boom and gear involved in this accident?

A. Yes, sir. [39]

* * * * *

Q. (By Mr. Howard): Do you know when these pictures were taken, Captain Harris?

(Testimony of Jack Harris.)

A. I believe they were taken the day following the accident. I'm not—I was there when the photographer was taking the pictures, but my mind is hazy whether it was the afternoon in Olympia or the next day. I believe it was the next day on Monday.

Q. Will you state whether or not these pictures include any of the boom or the gear that was involved in this accident?

A. Yes, I would say so, especially in A-2, where I can locate the boom as being number two starboard boom.

Q. And where were these pictures taken?

A. In Olympia.

Q. At Olympia.

Mr. Howard: I offer these exhibits. [40]

Mr. Poth: Your Honor, I'm going to object to them, your Honor. This witness hasn't testified—he's not a photographer.

The Court: The objection is sustained.

(Defendant's Exhibits Nos. A-2 and A-3 for identification were refused.)

Mr. Howard: May I inquire of your Honor on what ground the objection is sustained?

The Court: The Court declines to state. You may proceed. The Court regards the authenticating proof as insufficient.

Q. (By Mr. Howard): Captain Harris, how did you first learn of this accident?

(Testimony of Jack Harris.)

A. I was told by the night relief mate who was on duty at the time. I believe it was shortly after five o'clock.

Q. And what did you do upon learning of the accident? A. What did I do?

Q. What did you do upon learning of the accident?

A. I went out on deck to see if I could find out what caused the accident or just what the accident was.

Q. Was the injured man, Mr. Cordray, still on the ship?

A. No. No, he had gone to the—had been taken to the hospital.

Q. Were any of the longshoremen around at that time?

A. There was longshoremen at number three hatch, which was [41] still working cargo.

Q. And where did this accident occur?

A. At number two hatch. The boom—

Q. Were there any longshoremen at that location? A. No, sir.

Q. Now, did you find any part of the gear involved in this accident on or around the vessel?

A. I saw the block that fell lying on the dock close to the shed. It was on the dock; not on the vessel, on the dock.

Q. And what did you do with respect to that piece of gear?

A. I went on the dock and brought it aboard

(Testimony of Jack Harris.)

ship and took it up to the spare room and locked it up.

Q. And thereafter what did you do with it?

A. I gave it to I believe Mr. Soriano in Olympia the next day. [42]

* * * * *

(A gantline block was marked Defendant's Exhibit No. A-4 for identification.)

The Court: It is marked for identification A-4. Will Counsel spell for the convenience of the jury and the Court the word "gantline"? [43]

* * * * *

Q. (By Mr. Howard): Can you identify the item which is placed before you as Identification A-4? A. Yes, sir.

Q. What is that?

A. Well, that was a tent gantline block from number two boom, number two starboard boom.

Q. Off what ship? A. P & T Adventurer.

Q. Is that the piece of gear that you referred to that you recovered off the dock?

A. Yes, sir, it is.

Q. And is that a piece of the gear that was formerly attached to the ship the P & T Adventurer? A. Yes, sir.

Mr. Howard: I offer that in evidence.

* * * * *

(Defendant's Exhibit No. A-4 for identification was admitted in evidence.) [44]

The Court: You may cross examine later concerning the matter.

(Testimony of Jack Harris.)

Q. (By Mr. Howard): Captain, would you describe for us exactly what a hatch tent gantline is and how it is used aboard a ship such as the P & T Adventurer?

A. Well, in a case of rain we have these hatch tent gantlines on the head of the booms to hold a hatch tent, a tent over the hatch to protect the hatch from the rain. It's a simple—that's what they are used for.

Q. And how many hatch tent gantlines are used to each hatch? A. Two.

Q. And how many tents would be used to each hatch or hold of the ship?

A. Just one on that particular hold.

Q. From what point would the hatch tent gantlines be suspended?

A. From this block from the head of the boom. This strap is about four feet long hanging down from the head of the boom.

Q. What type of material is in the strap that you refer to? A. It's steel, plow steel.

Q. And the size, approximately?

A. Five-eighths inch diameter.

Q. And the length of the strap in its complete full condition? [45]

A. Approximately four feet.

Q. And the upper part of that is around the tip of the boom?

A. There's an eye, the upper part has an eye that fits over the head of the boom.

(Testimony of Jack Harris.)

Q. And what is below the block that you have before you?

A. We have a Manila, about three and a half inch Manila line rolled through the block.

Q. And where does that extend to?

A. Down to the deck.

Q. How is the hatch tent raised then?

A. Well, it's raised by attaching one end of this Manila line to the hatch tent and hauling it up with the hauling part.

Q. Now, is that a regular part of the ship's gear?

A. Yes, we generally carry them when we have general cargo.

Q. While vessels such as the *Adventurer* are on the Pacific Coast at various dispatching ports where are those straps and gantline tents located or maintained?

A. Well, the hatch tents themselves, the stevedoring company furnishes them. We just have the gear handy to put them up.

Q. When are they inspected or overhauled by personnel from the ship?

A. Well, usually all wire on the ship is slushed down every [46] trip when the booms are down, usually on the westbound passage on the inter-coastal run.

Q. When you arrived on the deck of the *P & T Adventurer* after receiving a report of an accident on the morning of July 15th did you make any observation as to where or how the lower end of the

(Testimony of Jack Harris.)

gantline was secured for this particular piece of gear?

A. The lower end of the gantline was secured, there were several turns taken around the shrouds.

Q. Now, what is a shroud, Captain?

A. Well, a shroud is a stay for the mast, to keep the mast steady.

Q. What is its purpose?

A. To stay the mast, to keep the mast steady.

Q. And where is it stayed from, between what points?

A. From a point up on the mast down to the deck.

Q. And how many shrouds are there to a mast?

A. There are about three as a rule.

Q. And the one that you refer to would have been located where, the lower end of the shroud?

A. The lower end of the shroud?

Q. Yes.

A. Over by—it's connected to a pad eye on the deck near the bulwarks.

Q. And the bulwarks are the rail of the ship?

A. Yes. It's on the deck, though.

Q. And where would that pad eye to which the lower end of the shroud was attached be located with reference to the side of the ship next to the dock?

A. Well, it's the outboard side. It's right next to the side or the outer shell of the ship on the deck.

Q. Now, where then was the hatch tent gant-

(Testimony of Jack Harris.)

line attached as you observed it after the accident?

A. They were wrapped around the shrouds with several turns.

Q. What part of the gantline was wrapped around the shroud?

A. The lower part of the gantline.

Q. And how many turns were on it approximately?

A. Oh, I'd say four turns around a couple of shrouds.

Q. And when did you make this observation?

A. Shortly after I was informed of the accident.

Q. Captain, how had the booms been rigged before this accident occurred in order to use the cargo-handling gear of the ship?

A. Well, we were starboard side to the dock, so the starboard boom was out over the dock, and the port boom would be a little to the port side of the hatch, a little outboard from the port side of the hatch, not straight up and down but out a little bit. Not over the side, though.

Q. Now, how far did this starboard boom extend out over the [48] side of the ship over the dock?

A. Well, I'd say about twenty feet.

Q. And at what angle would that be extended?

A. The boom?

Q. Yes. A. Oh, I should say sixty degrees.

Q. I'll ask you, Captain, if the angle of the boom would have been approximately the same as

(Testimony of Jack Harris.)

shown in Identification A-3 that has previously been before you?

A. As far as I can judge, yes.

Mr. Poth: Oh, just a minute. I believe your Honor refused the offer of A-3 and A-2 and now he's attempting to cross examine, I mean to examine this witness on exhibits which have not been admitted.

The Court: He has a right to ask if the contents of an exhibit are true and correct, and that is in effect the meaning of this question. The sight of the thing inquired about is not before the jury. The objection is overruled.

Q. (By Mr. Howard): I'll ask you also, Captain, if in Identification A-3——

Mr. Howard: Which I ask be passed to the witness, and A-2 also.

The Court: That will be done.

(The exhibits were handed to the witness.)

Q. (By Mr. Howard, continuing): ——if there is apparent in the pictures any other hatch tent gantlines intact such as were used on this vessel at the time of this accident?

A. Yes, I believe I can make out one, the number three forward starboard boom.

Q. Will you state whether or not the hatch tent gantline that you refer to is secured at the lower end at any point aboard the ship?

A. It appears to be so.

Q. And where is it secured?

A. Well, that I just can't—it's not quite clear

(Testimony of Jack Harris.)

enough. It's down around the deck or on the rail.

Q. Captain, if the starboard boom is extended as you described it on the morning of July 15th and the hatch tent gantline is secured around the shroud as you have described it in your testimony, what would happen if the boom was swung in or wung in by the stevedores without releasing the lower part of the hatch tent gantline?

A. There would be a strain put on the hatch tent gantline, naturally.

Q. Incidentally, is the hatch tent gantline intended to be used in connection with the lifting or lowering of any cargo or loads of cargo? [50]

A. No, it has nothing to do with the handling of cargo at all. It's merely to hold the tent up.

Q. Is it intended for use in any way in connection with the swinging in or winging in or out of the cargo booms? A. It is not.

Q. What weight or strain is intended to be borne by the hatch tent gantline?

A. To hold the hatch tent in place.

Q. And the Manila part of that that you've referred to, what was the size of the Manila rope in that?

A. It was three and a half inch circumference.

Q. And as it was rigged on the morning of July 15th was there one or two thicknesses of that extending between the block and the deck?

A. There was two.

Q. Now, Captain, who performed the stevedoring operations, again?

(Testimony of Jack Harris.)

A. Seattle Stevedoring Company.

Q. Who would have the responsibility for trimming the booms at the completion of the discharging operations?

A. Well, the hatch boss or the walking boss, the stevedore walking boss.

The Court: I call Counsel's attention to the fact that he used the verb "would", w-o-u-l-d.

Q. (By Mr. Howard): Who did have the responsibility on the [51] morning of July 15th of '56?

A. The walking boss.

Q. By whom was he employed?

A. By Seattle Stevedoring Company.

Q. Did the members of the ship's crew participate in any way on the morning of July 15th in winging in the booms on number two hatch?

A. No, sir.

Q. What would be necessary to be done by the longshoremen in winging in the booms with respect to the hatch tent gantline?

A. Well, to let it go, slack it off.

Q. Had that been done as you observed it?

A. Evidently not as I observed it.

Q. Captain, did you have an opportunity to examine this wire strap, gantline strap, when you recovered it from the dock after the accident?

A. Yes.

Q. And where did it part with respect to the length of the wire strap?

A. I would say about two-thirds down from the

(Testimony of Jack Harris.)

top, I mean one-third from the top, two-thirds up from the block.

Q. Now will you describe its appearance at the point where it broke?

A. It was frayed quite a bit. It had parted with quite a [52] snap. It unraveled.

Q. By "frayed" what do you mean, or "unraveled"?

A. Well, each strand was—there were ragged ends of the strands or the wire.

Q. Was it as it now appears in Exhibit A-4?

A. Yes.

Q. And is that as it appears in the pictures which have been marked for identification as A-2 and A-3? A. Yes.

Q. And does the upper end of the strap that you have referred to appear the same in Exhibits A-2 and A-3 as it appeared from your observation of the gear on the morning of July 15th?

A. Yes, it does.

Mr. Howard: I again offer the pictures, A-2 and A-3. If it——

The Court: Just a minute.

Mr. Poth: Pardon?

The Court: Now you may make your statement.

Mr. Howard: If the objection made by Counsel goes to the fact that the photographer has not been called to identify the pictures, I'll be very happy to call the photographer from Olympia for that purpose, but I'm trying to obviate the neces-

(Testimony of Jack Harris.)

sity of calling a photographer from Olympia to do that. [53]

The Court: Counsel offering I believe and the Court had not at the time of this offer made at this time heard any objection.

Mr. Poth: Can I see the pictures?

The Court: They will be shown you.

(Brief pause.)

The Court: The Court wishes to rule. The Court feels that the ruling has been delayed long enough and I wish to announce the ruling. Defendant's Exhibit A-2 is now admitted, likewise Defendant's Exhibit A-3. Each of them is now admitted.

(Defendant's Exhibits Nos. A-2 and A-3 for identification were admitted in evidence.)

The Court: Proceed.

Q. (By Mr. Howard): Captain, referring to Defendant's Exhibit A-3, I will ask you whether there is a hatch tent gantline from another hatch appearing in the foreground of that photograph?

A. There appears to be so, yes, sir.

Q. And from what hatch would that appear to be?

A. That would be from number three forward gear.

Q. And where is the lower end of that hatch tent gantline secured?

A. Well, it appears to be secured either on the bulwark or on the deck. [54]

Q. In the immediate foreground in A-3 is there another hatch tent gantline or the lower portion

(Testimony of Jack Harris.)

of it visible in the foreground? A. Yes, sir.

Q. And where is that hatch tent gantline secured?

A. That's secured on the railing at the after end of the forecastle or number one hatch.

Q. And in what manner is it secured?

A. Well, it's wrapped around the railing there.

Q. Is it customary on ships of this type, Captain, to always secure the lower end of the hatch tent gantline at some point?

A. Yes, on the outboard side or the side you're working cargo from you have to get it back out of the way, just simply to get it out of the way from the——

Q. On the morning of July 15, 1956, did you observe the condition of the wire and the core of the wire in the portion of the strap that you recovered? A. Yes.

Q. Now A-4, Exhibit A-4.

A. A-4, yes.

Q. Will you state what you found the condition of the strap to be?

A. Well, it was in my opinion in fair condition. It wasn't new by any means, but it was in condition enough to [55] perform the work it was intended for.

Q. From your experience as a master and a mate on merchant vessels will you state whether or not you considered the strap, the wire in the strap, was in serviceable condition for use?

A. For its intended use, yes, I do.

(Testimony of Jack Harris.)

Q. And that intended use was——

A. To hold the hatch tent up.

Q. Captain, if there had been a deterioration or a wearing or a worn portion in the wire strap and it had broken because of that, what type of break would you find?

A. Why, I don't believe it would break with such a snap. I don't think the ends would be frayed quite as much.

Q. What did the frayed or separated portions of the wire indicate to you as you observed them on the morning of July 15th as far as the nature of the break?

A. Well, it had a severe strain put on it.

Q. Captain, have you checked the log book that is now in evidence as A-1 as far as the days preceding the accident that the ship was in Seattle, and will you do so and tell me whether the ship had to use hatch tents or whether hatch tents were used on any preceding day? [56]

* * * * *

A. No, there were no hatch tents used.

Q. What was the weather?

A. Well, the weather was partly cloudy and clear. There is no indication of rain.

Mr. Howard: You may cross examine.

A. Partly cloudy and cloudy, but no rain.

Mr. Poth: May I have that log book, please?

The Court: That will be afforded Counsel.

(Defendant's Exhibit No. A-1 was handed to Mr. Poth.) [57] * * * * *

(Testimony of Jack Harris.)

Cross Examination

Q. (By Mr. Poth): What time did that ship sail on the 15th?

A. What time did it leave Seattle?

Q. Yes.

A. Approximately six o'clock in the morning. It could have been—we were late. I know we weren't through discharging as early as anticipated. It might have been a little——

Q. What time did the stevedores knock off?

A. Well, I——

Mr. Howard: May the witness have the log book to refer to?

A. I'd have to refer to the log book.

Mr. Howard: For the times?

The Court: The witness may have access to it to answer questions if he needs such access.

A. Just glancing over there I believe it said the number two hatch knocked off at five.

Q. (By Mr. Poth): Do you need the log book?

A. Well, I don't remember those times in my head.

Q. Do you have to have it aboard ship?

A. Yes.

Q. You do? A. I do.

Q. I'll give it to you in just a minute. Now I'm referring to a page of the log—I'll read this to you—in which the accident to Jack Cordray is reported. Now, did you make that entry yourself?

A. I did not, no. That was made by the relief officer. I forget his name at the present, but——

(Testimony of Jack Harris.)

Q. Now I'll read this entry here to you. It says, "0630. Tested steering gear, whistle, telegraph, running lights. All in order. At about 0450 while longshoremen were swinging in two starboard booms the wire strap on tent [59] gantline parted. The block and part of strap fell, striking Jack Cordray, dock foreman, who was standing on deck opposite number two. Extent of injuries unknown. Man taken to hospital."

Now I will hand you this log book and ask you to point out to the Court and the jury any other reports contained in that log relative to the investigation of the cause of the accident and the happening of the accident other than what I have just read.

A. No, I don't believe there is any. I'll take a look. (Brief pause.) No, that's the only entry in the log pertaining to Cordray or the accident.

Q. And so these things that you have told us here today you did not at that time see fit to put in the log, is that correct?

A. Yes, that's correct.

Q. Now, you were second mate at that time?

A. Yes, sir.

Q. How long have you been employed by Pope & Talbot?

A. I joined my first Pope & Talbot ship in July of 1942.

Q. You've been with them ever since?

A. Ever since, yes, sir.

Q. You're a steady company employee?

(Testimony of Jack Harris.)

A. I'm a steady company employee.

Q. And they have now given you your own ship, is that right? [60]

A. Yes, sir.

Q. How many years did it take you to get that ship?

A. Well, I really didn't ask for it. In fact, for many years I wouldn't sail anything but second mate, but I had——

Q. Now, as an officer aboard a vessel I'll ask you whether or not it is not your duty to see that all of the gear, tackle and apparel and appurtenances and furniture of the ship are kept in good and seaworthy order?

A. That's usually the job of the chief officer, the chief mate, although if any of the other mates see anything that isn't in order, why we always tell him and he'll have it corrected.

Q. And you're supposed to keep things oiled and greased and painted, isn't that right?

A. The best we can under the conditions as they may be.

Q. Now, do you know when the last inspection of this tent gantline block was made?

A. No, I couldn't tell you that.

Q. Do you know when this tent gantline block was painted the last time prior to the time it fell down?

A. No, I do not.

Q. Now, as an officer aboard the vessel wasn't it your duty or the duty of all of the officers or some of them to see that the gear was constantly inspected and kept in [61] order?

(Testimony of Jack Harris.)

A. That's primarily the duty of the chief officer.

Q. Well, what's your duty as second mate?

A. The duty as second mate, out at sea I stand a sea watch, I stand a bridge watch, I'm in charge of the bridge for eight hours a day, and in port I work on deck under the supervision of the chief officer.

Q. So then it would be the duty of the chief officer to have this inspected and kept in order, is that right?

A. Yes, that's primarily his duty. But as I say, the other officers, if they see anything that's not right and needs changing, why we report to him and he sees that it's done.

Q. Do you think this is a good block?

A. Well, it shows a little wear.

Q. What type of splice is this?

A. I didn't examine it too closely. It's a Liverpool splice, I guess.

Q. Could you look at it for sure and tell me what type of splice it is?

Mr. Howard: May the record show that the witness does not have the exhibit in front of him to answer the question, your Honor?

The Court: Have you any objection to the witness stepping down there just a minute? [62]

Mr. Poth: Pardon?

The Court: Have you any objection to the witness stepping down there just a minute?

Mr. Poth: No, I do not, Your Honor.

(Testimony of Jack Harris.)

The Court: If you would like to, step down to Counsel table for just a minute, Captain.

(The witness stepped to Counsel table.)

The Court: Now will Counsel keep their places. I will return the witness to the witness chair. Now, then, avoid conversation. Ask him a question.

Mr. Poth: Yes.

Q. (By Mr. Poth): Do you know what type of splice that is?

A. That's called a Liverpool splice.

* * * * *

Q. (By Mr. Poth): Now, when you went out on the dock and you took this block and then you went up and locked it [63] up somewhere, where did you lock it up?

A. I locked it up in a spare room up on the officers' deck on the port side.

Q. Now, how do you know——

A. We used it for a pilot room and——

Q. Now, how do you know this is the same block?

A. It appears to me to be the same block. I didn't put my initials on it, but it appears to me that it's the same block.

Q. But you don't know for sure whether this is the same block? A. Well, I'm rather certain.

Q. Well, would you be more sure in saying that this is a block that looks like the block?

A. Well, I'd say that it is the block.

Q. How are you able to tell that it is the block? Did you initial it? A. I did not initial it.

(Testimony of Jack Harris.)

Q. And how long since you've seen a block like this?

A. Oh, I can look at one every day if I want to.

Q. I mean one that's broken like this.

A. Well, since I turned that over to Mr. Soriano, why I haven't seen one broken like that.

Q. When was it you turned it over to him?

A. The day following the accident. [64]

* * * * *

Q. (By Mr. Poth): Now, would you look at this strand right here——

A. Will you pardon me while I get my glasses?

Q. Get your glasses on.

* * * * *

Q. (By Mr. Poth) : Tell me what you see, if anything, on that strand.

A. It's a broken strand.

* * * * *

A. Well, this broken strand has a little rust around it, but there's some bright metal yet.

Q. (By Mr. Poth): Doesn't this appear to you to be smashed and sort of pressed together, the ends? A. Yes, it does.

Q. What would cause that? That isn't what you see when something breaks loose that pulls loose and snaps?

A. Well, it may have been the center core that didn't—— [65]

* * * * *

Q. (By Mr. Poth): Now referring to these other

(Testimony of Jack Harris.)

bright ends, I'll ask you whether or not they are not pounded flat on the end?

A. No, they are pretty sharp. I don't see that they are flat.

Q. Now look very closely.

* * * * *

Q. (By Mr. Poth): Look very closely.

A. I wouldn't say they are pounded flat.

Q. Well, they are flattened, aren't they?

A. They come to a fairly good point.

Q. Yes, a chisel edge.

* * * * *

Q. (By Mr. Poth): Showing you these strands here, I will [66] ask you to describe the actual appearance of the ends there, and I'll ask you whether or not those ends do not look like they have been pounded out flat?

* * * * *

A. I see no appearance of them being pounded flat. There's a little rust or grease on the outside of the wire, and the center of the wire is bright, but I don't see no evidence of being pounded flat.

* * * * *

Q. (By Mr. Poth): I'll ask you to look at these here also. Don't break the ends off.

A. No. I'll say the same answer, I don't see where they are pounded flat.

Q. Well, they are flattened, though, aren't they?

A. I don't know what you mean by flattened. Do you mean the wire is flattened? The wire is round.

Q. Well, the end. Just look carefully. Now, look-

(Testimony of Jack Harris.)

ing at this one, doesn't this have the appearance of having been sheared at some previous time?

A. Well, in my judgment it could have been, but a wire [67] could break that way just as well.

The Court: Now will Counsel ask the witness what he understands the meaning of the word "sheared" to be?

Mr. Poth: Yes.

Q. (By Mr. Poth): What do you mean by the word "shear"?

A. Well, cut. Cut like with a chisel, that's what I would say.

Q. Do you know where this block has been for the last year and three months? A. No. [68]

* * * * *

(Defendant's Exhibit No. A-3 was handed to the witness.)

Q. (By Mr. Poth): Now I'll ask you to look at Defendant's Exhibit A-3. A. Yes.

Q. Which purports to be a picture of a boom, is that correct? A. That's correct.

Q. And also the deck of a ship?

A. Yes, sir.

Q. Now, in that picture the boom is fairly well lowered but is extending outboard from the ship, is it not? A. Yes, sir.

Q. Now, that is not the normal way a vessel's gear in respect to its booms is carried while the vessel is at sea, is it? A. No, sir.

Q. How are those booms carried when at sea,

(Testimony of Jack Harris.)

referring now particularly to the P & T Adventurer?

A. With a deck load of lumber it's usually impossible to put the booms down. They are carried straight up, lashed against the cross tree, in a cradle up against the cross tree. With no deck load they are usually lowered down and cradled.

Q. Cradled in what? [69]

A. Well, they have a little cradle to fit the boom. On this particular——

Q. Is that called a boom rest?

A. A boom rest. On this particular number two on the Adventurer it rests on the mast house or the mast table at the after end of the hold.

Q. And what's up there on the mast house to hold the boom?

A. There's a cradle up there, a wooden cradle. The boom sticks a little bit over the mast house. The cradle would hit the boom about ten foot down from the head of the boom, the cradle on the mast house.

Q. And how long is this pennant from which the——

A. Approximately four feet.

Q. You wouldn't say the pennant could possibly be about eight feet, the pennant on the gantline block?

A. Eight feet, no, sir.

Q. Six feet?

A. No, I'd say approximately four feet.

Q. And where is it secured and made fast, the pennant of a gantline block?

A. The pennant, the eye on one end of the pen-

(Testimony of Jack Harris.)

nant is slipped around the head of the boom. [70]

* * * * *

(Defendant's Exhibit No. A-3 was handed to Mr. Poth.)

Q. (By Mr. Poth): Have you ever seen tent gantline blocks fall down when there was no strain on them? A. No, no.

Q. You've never seen that happen?

A. I never have.

Q. Have you ever seen them fall down with a tent on them?

A. Not with a—yes, I have with the rope, the Manila breaking, but not with the strap breaking, not with the wire strap breaking.

Q. What's the testing strength of the Manila rope? A. What size?

Q. The size that was on this gantline block, if this was the gantline block.

A. I would say about between four and five tons new.

Q. And what is the breaking strength of this wire here?

A. That's five-eighths inch wire. Twelve to fourteen tons, fifteen tons.

Q. That would be about four or five times the breaking strength of the rope, the Manila rope?

A. About four times. I'm talking about new material.

Q. Now, have you ever seen tent gantline pen-
nants or straps become injured in any way or be-
come faulty in any way? [71] A. No.

(Testimony of Jack Harris.)

Q. Is it ever necessary to replace one?

A. We replace them periodically. Just the action of the weather and elements will deteriorate them.

Q. Did you ever see one of them get smashed?

A. No.

Q. Or pinched? A. Not to my knowledge.

Q. Now, did you ever see one get caught in a boom rest? A. In a boom rest?

Q. Yes.

A. Not that I've ever noticed, although it would be possible where the rest is on the end of the boom, close to the end of the boom.

Q. It is possible to have them caught in a boom rest, is that right?

A. Yes, sir, if the boom rest or the boom rests towards the end of the boom, towards the blocks where the gear is, but in this particular case the boom rest is ten feet down from the end of the boom. It would be impossible in this particular case.

Q. You're sure this one is ten feet down?

A. Yes, on this particular ship.

Q. All right. When you have a deck load and you secure the boom in an upright position instead of fore and aft along [72] deck of the vessel or the boom rest on the house, how do you secure the boom when you top it up?

A. It's put in a cradle.

Q. You carry mostly lumber, is that right?

A. On an eastbound trip.

Q. Now, when you secure them in an upright position for sea, who does that work?

(Testimony of Jack Harris.)

A. The sailors.

Q. Who are the sailors employed by?

A. Pope & Talbot, or the steamship.

Q. Now, in an upright position the boom is cradled at the end, is it not, or very close thereto?

A. Oh, I'd say maybe five feet. I never measured it.

Q. And what's that cradle aloft made out of?

A. Steel, or an iron cradle, collar.

Q. Now, is it possible to catch this pennant in that boom rest? A. That would be possible.

Q. And could it possibly be chafed and injured while it's being carried up there?

A. That's—it could be possible in that case. It's according to how you secure your gear up there.

Q. Now, in all normal practice it is the duty of the crew under the supervision of the officers such as yourself to place those booms in their proper rests? [73]

A. The crew is strictly under the supervision of the chief officer. If he is not present, why then the next officer can handle the crew.

Q. Now, when this vessel came into port were her booms broke out of the rests?

A. When this vessel came into Seattle her booms were flying. They weren't—well, you know what I mean when I call it flying. They weren't secured, they were just flying up in the air with the runners crossed and the preventers—

Q. That's right, they had been taken out of their boom rests, is that right? A. Yes.

(Testimony of Jack Harris.)

Q. Now, whose job was it to do that? Was that done by the crew of the vessel?

A. That's done by the crew of the vessel.

Q. You still don't know where this has been for the last year and three months? A. No, sir.

Q. What is the weight of the Manila rope that went through here? A. The weight?

Q. Yes.

A. It was a three and a half inch circumference. Now, the weight of it, I don't know offhand what it would weigh. [74]

How many pounds a foot I wouldn't know offhand.

Q. What do you think it would weigh?

A. Oh, a pound and a half a foot, maybe.

Q. And how many feet long was it?

A. Approximately 45 feet.

Q. 45 feet——

A. Say eight fathom, 48 feet.

Q. So it weighs a pound and a half a foot, Manila rope, is that right?

A. That's my guess.

Q. That's your best estimate, a pound and a half a foot, and of course being that it went through this sheave here it would be double, is that right, so you'd have approximately ninety feet of rope, is that right? A. Yes.

Q. So the weight of the rope hanging on this would then be 90 times a pound and a half?

A. You'd just have as much rope according to the height of the boom. * * * * *

(Testimony of Jack Harris.)

Q. (By Mr. Poth): What would the approximate weight of the rope be, ninety feet of rope?

A. Well, I'd say 125, 130 pounds, 135 pounds.

Q. What type of winches did the P & T Adventurer have on her?

A. Electric winches.

Q. Were they operated on the double or on the single?

A. On the single.

Q. That is——

A. Single gear.

Q. All right. Was it rigged up for two winch drivers to drive or one winch driver would operate both winches?

A. One winch driver.

Q. You didn't see the accident happen?

A. No, sir.

Q. And when you got there everything had been done, is that right?

A. That's right.

Q. And was the boom winged in when you got there?

A. Yes, sir.

Q. And to what position was it winged in with respect to the railing of the vessel?

A. It was clear of the rail.

Q. Just clear of the rail?

A. Clear of the rail. I don't know how far in, but that's the general practice.

Q. Now, was the preventer made fast?

A. No. [76]

Q. Was the steam schooner guy secured?

A. Yes.

Q. Was the rope guy secured?

A. Yes.

Q. What was the preventer? How was that fixed?

A. That was just hanging there.

(Testimony of Jack Harris.)

Q. And you say you saw what had been you presumed to be the rope of the tent gantline slung over the shrouds, is that right?

A. One end of the tent gantline was out on the dock. It had been cut to free the block from it, and I took the tent gantline and hauled it on board, unfastened it from the shrouds and coiled it up.

* * * * *

Redirect Examination

Q. (By Mr. Howard): Would the winches be used in winging in the booms? A. Yes, yes.

Q. And who would drive the winches?

A. The winch driver. [77]

Q. And by whom are the winch drivers employed? A. The stevedoring company.

Mr. Howard: That's all.

The Court: Anything else?

Mr. Poth: No, Your Honor.

* * * * *

(Witness excused.) [78]

* * * * *

Mr. Poth: I'll call Mr. Gerst.

WALTHER GERST

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Poth): Will you state your name, please?

(Testimony of Walther Gerst.)

A. Walther Gerst. The first name is spelled W-a-l-t-h-e-r, G-e-r-s-t. [112]

Q. And where do you live, sir?

A. 605 5th North, Seattle 9, Washington.

Q. And what is your occupation?

A. At present I am a rigger at Todd's Shipyard and Drydock Company.

The Court: Rigger?

A. Yes, sir.

The Court: Will you tell the jury, what is the ordinary work of a rigger at the Todd Shipyards?

A. Well, sir, there's several different things there. You may be working in the sail loft where you're splicing.

The Court: The sail loft, what is that? What are you doing there?

A. Splicing wire and rope.

The Court: What else as a rigger do you do at Todd's?

A. Well, you're hanging rigging up on the ship.

The Court: What is rigging? What is it you hang when you hang something up called rigging?

A. Well, it's according to what the job is, sir. You're liable to rerig the ship; that's putting topping, lifts, guys.

The Court: You mean tying ropes and putting [113] them in place in pulleys and fastening it at one end or the other or both ends as the work of loading and unloading the ship or as the work of bringing material aboard the object being repaired or built at Todd's progresses?

(Testimony of Walther Gerst.)

A. Yes, sir, and furthermore, if you're working down in the engine room you're setting up the rigging to take heavy machinery out of the engine room, and so on and so forth.

The Court: That is a mysterious word. What is a rigging in the engine room now that you would be setting up?

A. Well, you'd have to hang chain hoist.

The Court: Hang a chain hoist to a ceiling beam or something like that?

A. To beams or through holes through the beams or beam clamps. It's according to what operation you have to do, sir.

The Court: Yes. You may proceed.

Q. (By Mr. Poth): And have you been a seaman, gone to sea?

A. Yes, sir. I was chief boatswain for the Military Sea Transport Service, the Army Transport Service, several ships, ever since I've been fourteen years old.

Q. You've been sailing since you were fourteen?

A. Yes, sir. [114]

Q. How old are you now?

A. I will be fifty-four next August the 3rd.

The Court: Where were you born, Mr. Gerst?

A. Philadelphia, sir.

Q. (By Mr. Poth): How long have you been on the West Coast here?

A. Well, I came around on several intercoastal ships while I was a youngster, but to make my home

(Testimony of Walther Gerst.)

on the West Coast I'd say somewheres around '24 to '26, somewheres around in there, sir.

Q. 1924 to 1926?

A. Somewheres in there, yes, sir.

Q. How many voyages do you think you've made as a seaman aboard vessels?

A. Well, that would be hard to say unless I looked my discharges over, sir. Some of them might be lost. I lost some of them during the second world war that went down.

Q. Have you been around the world?

A. Oh, I'd say at least nine or ten times, sir.

Q. Now, in respect to rigging, tell us whether or not you ever taught rigging.

A. Yes, sir, several times. In the early part of the second world war I was rigging and winch driver instructor for the Army Transport Service, instructing crew members in rigging and winch driving and breaking in Army [115] troops. I think they called them port battalions or stevedoring companies. I don't know what the terminology was. Then I was instructor at Fort Lawton for the Military Sea Transport Service as a winch driver instructor and rigging instructor.

Q. Do you know one kind of a splice from another as a rigger? A. Yes, sir.

Q. Is that part of a rigger's job, to make splices?

A. Riggers in the sail loft, yes, but outside riggers, no.

Q. Have you ever worked as a sail loft rigger?

(Testimony of Walther Gerst.)

A. Yes, sir, for Puget Sound Shipyard, Alaska Steamship Company, the Steverson Stevedore Company in Wilmington, California. Did I mention Foss Tug? Foss Tug Company here in Seattle, and a few others I just can't remember right now.

Q. Now, were you working on the night of the 14th of July, 1956, and the morning of July 15th, 1956, here in Seattle?

A. Well, you gave me the date of the morning or the evening before. I wouldn't say, but I was working on that ship the night of the accident, if that's what you're referring to. Whether it was the 14th or 15th I wouldn't say.

Q. And how did you happen to be working aboard her? [116]

A. Well, I was the hatch tender of that gang working in number two hatch, sir.

Q. And when had you started work?

A. At seven o'clock in the evening.

Q. Were you a regular longshoreman or were you just filling in?

A. Well, they were short of winch drivers at the time. I worked on the waterfront down south as a winch driver, hatch tender and foreman. In the port they were short of winch drivers at the time, and I get quite a bit of employment that way in the springtime when things are pretty good here practically anywheres on the coast, whatever port I happen to be in.

Q. In front of you is Defendant's Exhibit 4—

(Testimony of Walther Gerst.)

The Court: A-4.

* * * * *

(Witness excused temporarily.)

WALTHER GERST

resumed the stand. [147]

(Defendant's Exhibit No. A-4 was placed before the witness.)

Direct Examination—(Continued)

Q. (By Mr. Poth): Now, Mr. Gerst, please examine the splice on that block and tell us what kind of a splice it is.

A. It starts out as what we call a West Coast or logger splice——

* * * * *

Q. (By Mr. Poth): Would you please tell us if that splice has a name?

The Court: Did you ask him before? Has he previously testified that this does have a splice of some sort or other?

Mr. Poth: Yes. I'll start there, your Honor.

Q. (By Mr. Poth): Does that have a splice on it? A. Yes, sir. [148]

Q. And what sort of a splice is it?

A. Well, it's called either a West Coast splice or a logger splice.

The Court: For what purpose is the splice there, if you know? For what purpose was it originally put there or is it now there, if you know?

A. Well, this was——

(Testimony of Walther Gerst.)

The Court: Mr. Gerst, these jurors, some of them, doubtless do not know a thing in the world about this business at all, this business of blocks and tackle and lines and things like that.

A. Well, the difference of splices, sir, some are started different than others.

Q. (By Mr. Poth): Mr. Gerst, why is it necessary, if it is necessary, to put a splice on a block like that?

A. Well, to join—to make an eye splice and join your wire together, that is the idea of making your wire splice. It's to bring your wire around through here and splice it into its own part.

Q. Are there different kinds of splices used for that purpose? A. Yes, sir.

Q. What type of splice is that one there?

A. This is what they would call either a West Coast or a logger splice. [149]

The Court: L-o-g-g-e-r?

A. Yes, sir.

Q. (By Mr. Poth): What is a Liverpool splice?

* * * * *

Q. (By Mr. Poth): Please tell us how a Liverpool splice is spliced or made.

Q. You splice six, five, four, going through the same opening; three, two, one, goes under a single strand, and then you take two reverse lock tucks on each one. That is a Liverpool splice. A West Coast splice is under two and over one, the logger splice the same.

Q. Are the difference in the two regularly dis-

(Testimony of Walther Gerst.)

tinguishable by merely looking at them?

A. Yes, sir. [150]

The Court: What are the units that you refer to by the "one, two", and so forth?

A. Well, sir, there are six strands of wire here.

The Court: In other words, if you are dealing with a wire to be spliced, which wire has six strands that all go together to make up some part of the wire, is that it?

A. Yes, sir. You'll have six strands that make up your wire right here, sir.

The Court: All right, then do you call one of them one and the other one two or something like that?

A. Yes, sir, they each have different numbers.

The Court: All right, you may proceed.

Q. (By Mr. Poth): Now, did you examine the block that fell down and struck Mr. Cordray on the morning of July 15th?

A. Yes, sir, I did.

Q. And what sort of a splice did that block have on it?

A. A Liverpool splice.

The Court: Do you mean block or do you mean the wire?

A. The strap.

Mr. Poth: The strap, yes.

Q. (By Mr. Poth): What sort of a splice—— [151]

A. A Liverpool splice, sir.

Q. Does that have a Liverpool splice on it, the one A-4?

A. No, sir.

Q. Now, what sort of a block was it that fell on Mr. Cordray?

(Testimony of Walther Gerst.)

A. The block was the same type as this block, but these sleeves here came through the block with a bolt and a grommet on it. That's what I'm classifying as a sleeve. It come through two inches, I'd say, and a bolt goes through with a grommet in it.

Q. And what other difference, if any, did you notice between that block and this one, referring to the block itself?

A. The block itself? That's all the difference, I would say, sir, on the block.

Q. Now, what was the condition of the strap on the block that you saw aboard the P & T Adventurer on the morning of July 15th and the strap which you see there?

A. I would say the strap, the tail of the strap—what I mean by the tail of the strap, this part that's left of the strap—I'd say it was about two foot long or maybe two and a half foot long, that is from the back end of it or toe to the tail of the strap.

Q. Now, what was the condition of that strap as you saw it outside of its length, the one which you saw aboard the P & T Adventurer? [152]

A. The strap was split right here, all these wires were close together where it was just beveled in, and I felt it and it just felt like, well, I don't know how to explain it, like burnt coffee grounds; it just rolled out off into your hand. There was no slush on the strap, or pardon me, I meant to say lubrication, that's what we call slush, lubrication

(Testimony of Walther Gerst.)

on the strap. The core was not lubricated because there was no core at the end where it broke off.

Q. Did you see a core like that in the strap which you saw that night? A. No, sir.

Q. Was there any core at all?

A. Well, I cannot answer that because the wires were closed, they were rove in tight, and there was no core at the end where I could see. Whether there was any core in the rest of the strap I could not say.

Q. What was wrong with that strap, if anything, that you saw on the P & T Adventurer?

A. I would say the strap had deteriorated.

Q. In what manner?

A. Well, she had rusted through by not having proper lubrication of it.

Q. Now, what time did you come aboard that ship that night? [153]

A. I think it was about five minutes of seven or seven o'clock, somewheres in that whereabouts.

Q. And what was your job?

A. Hatch tender of the gang. One hour you're hatch tender, one hour you're driving winches. You change over between the two.

Q. Now, where were the booms when you came aboard that night at the number two hatch?

A. Well, they were rigged for the after end of the hatch.

Q. Now I'll ask you, is it possible ordinarily for the longshoremen when they come aboard a ship

(Testimony of Walther Gerst.)

to inspect the gear and tackle up at the top of the booms? A. It's impossible, sir.

Q. Why is that?

A. Because your booms are fifty foot long, approximately, and it sets on top—and your king post at your mast house and your gooseneck, that's seven or eight foot off the deck, and you would be about—the tip of the boom when it's lowered to work cargo I would imagine is anywheres from thirty to forty feet off of the deck of the ship.

Q. And if a strap on a gantline block was defective that night when you came aboard the ship on the yard boom on the starboard side, would you have been able to observe that? [154]

A. No, sir.

Q. And in fact did you observe any defect in the strap on the yard boom?

A. No, sir. If it was we'd have stopped operations until they were corrected.

Q. How long did you work that night?

A. I worked from seven till twelve, went to midnight lunch, returned at 1:00 a.m. and we were just finishing up, I'd say anywheres from a quarter to—fifteen minutes to five, ten minutes to five, when the accident happened. We was ready to go home, after the final completion of swinging the gear in.

Q. Did you see Mr. Cordray come aboard the ship? A. No, sir.

Q. Did you see him aboard the ship?

A. Yes, sir.

(Testimony of Walther Gerst.)

Q. And when was it you saw him aboard the ship?

A. I saw him while we were slacking the yard boom in, which would be the inshore boom or the starboard boom. We just had proceeded to slack the the offshore boom in. See, we have to slack both booms inside of the rail so when the ship leaves the dock it will not catch anything on the dock or maybe a tug or something alongside of it.

Q. How is it that you didn't see Mr. Cordray come aboard?

A. Well, I was busy with the operation of [155] slacking the offshore boom in.

Q. And what were you doing? Just exactly what were you doing?

A. Giving orders to the men to slack the gear in.

Q. Where were you standing?

A. Well, I was standing in several places, sir. First I was on the offshore side when we slacked the offshore boom in, then I came on over to supervise slacking the other one and I was over to the rail; I told them to take the tent gantline off and the preventer, told the man to stand by the guy, and I walked up forward a little bit more and gave orders to the winch driver to pull it in. What I mean is, pull it in with the ship's winch.

* * * * *

Q. (By Mr. Poth): Well, I'll ask the question, did you see the tent gantline let go and the preventer? [156]

A. Yes, sir.

(Testimony of Walther Gerst.)

Q. And where were they both secured, if they were both secured?

A. On a cleat on the ship's rail right—I'd say just a little aft of your shrouds. That's your wires that come down and hold your cross stays down to the ship's side.

Q. And in what order were they secured?

A. Your preventer was on the bottom and your tent gantline was on top.

Q. What is the preventer made out of?

A. Wire. The one on that ship was made of wire. There's several different types of preventers that different companies use.

Q. And then what type of winches were on that ship?

A. Electric winches. Westinghouse controls, I believe.

Q. Now, what portion of the hatch was being worked?

A. The after end of number two hatch.

Q. And where were the winches situated which you were using?

A. Aft of the hatch.

Q. Aft of the hatch?

A. Yes, sir.

Q. And how high up was the boom top, that is the yard boom, prior to the time you started to wing it in? I mean the degree of height rather than the—— [157]

A. Well, the degree of height, I would say—I'd say she was down about twenty degrees, maybe twenty-five, somewhere in there. I wouldn't say that's an accurate figure, I'm just guessing now.

(Testimony of Walther Gerst.)

Q. Was she topped up so that the after end of the hatch could be worked?

A. Yes, sir, topped up and wung out.

Q. She was not topped up to work the forward end of the hatch? A. No, sir.

Q. Well, tell us now just what you saw as this boom was being brought in.

A. Well, I walked up a little forward towards the hatch and told the winch driver to go ahead. I said, "Pull it in," and I'm watching the top of the boom to see when she come inside of the rail so we could stop the operation, and I see this tent gantline waving, then I seen it carried away and come right down amongst us, and I shouted "Look out" twice, and the block and the rope hit this gentleman there in the vicinity of the head or the chest and drove him into me. I was standing I'd say about—I'd say two or three feet behind Mr. Cordray.

Q. Did it come down fast or slow?

A. Well, sir, at them times when things are [158] coming towards you you don't notice the speed of things, you try to get out of there.

Q. And who was there with Mr. Cordray, if anyone, besides yourself?

A. Mr. Peters was standing I think right alongside of Mr. Cordray, and then over to the side at the rail was the two men that was slacking the gear in, myself,—now, there may be other people behind me, I wouldn't know.

(Testimony of Walther Gerst.)

Q. Now, you say you saw this tent gantline block hanging from the end of the boom, is that right?

A. Yes, sir.

Q. Well, why were you looking up there? Why was it necessary for you to look up there?

A. Well, to see when the end of the boom came inside your coaming. That is the ship's side. The coaming, we call it.

Q. Now, how far down was this tent gantline block hanging from the mast when you saw it up there? A. Do you mean the block?

Q. The block itself.

A. Well, I'd say six or seven feet. I could not give you an accurate figure because that is high up in the air.

Q. Now, what about the rope that went through the tent gantline block, how was that hanging?

A. It was in the block, rove through the block, [159] two parts, with the ends tied together in a square knot.

Q. Now, was there any strain on that block when you saw it up there hanging?

A. I don't quite understand what you mean, was there any strain on the block, sir.

Q. Was there any strain on the rope, the line going to the block? A. No, sir.

Q. Describe just how it was, how you saw it.

A. Well, your tent gantline was hanging like this to begin with to the ship's side until we undone it and threw it on deck. Then she hangs down

(Testimony of Walther Gerst.)

straight even with your boom, maybe a little bit—the weight of your rope may keep it back a little bit, and as the boom comes in your rope—your tent gantline and your preventer is coming in at the same time. The only thing you have the strain on would be your outboard guy and the strain on your winch fall pulling it inside the rail.

Q. Now state whether or not as you saw it that tent gantline block was hanging free.

A. I'd say it was, yes, sir.

The Court: Hanging free of what, would you mind asking him, Mr. Poth?

Mr. Poth: Well, perhaps I—thank you, your Honor. [160]

Q. (By Mr. Poth): I will ask you this: When the tent gantline rope is secured in place where does the tent gantline block find itself? That is, when you're working.

A. On the other end of this tent gantline rope there, attached to the tip of your boom on the outboard side the same as your guys and your preventers, on some ships. On some ships they have a big wire, a big eye on the end of the wire. This is the eye of the wire——

Mr. Howard: If the Court please, I'm going to object to this "on some ships".

The Court: The objection is sustained.

Q. (By Mr. Poth): Confine yourself to this ship.

A. I'm sorry, sir, I was just trying to explain.

The Court: Never mind what somebody said,

(Testimony of Walther Gerst.)

either the Counsel asking the question or the witness making answer about the block being free.

Mr. Poth: Maybe I can put it this way——

The Court: It is that thing that I want examining Counsel to direct this witness' attention to and try to get some explanation in the record of what is meant by that term.

Mr. Poth: Yes.

Q. (By Mr. Poth): Well, I might put it this way: Does the tent gantline block hang down?

A. Yes, sir. [161]

Q. When the gantline line is made fast to the cleat by the shrouds?

A. If it's made fast?

Q. Yes.

A. She will not hang straight down. She'll just hang towards whatever direction that you have your tent gantline fast to.

The Court: What do you understand by the expression, if you have any understanding of it, "the block hung free"? Has that any meaning to you as to what position the block is in when you refer to it as hanging free?

A. Are you speaking to me, sir?

The Court: Yes.

A. Yes, sir.

The Court: Say what it means.

A. Well, anything that's hanging free is any——

The Court: No, not anything, we are talking about this block.

(Testimony of Walther Gerst.)

A. If this block was hanging free she was not made fast to anything. That's our expression for it.

The Court: How would she be hanging if she was hanging free?

A. She would be hanging straight down, sir, not being made fast to anything. If it's made fast——

The Court: Except at the top end from which she was hanging, is that right?

A. From the top of your boom, yes, sir.

The Court: Now you may proceed.

Q. (By Mr. Poth): You mentioned that this block was swinging as the boom was being moved in?

A. Yes, sir.

Q. Why, if you know, was it swinging?

A. The vibration of the electric winches pulling it in. On electric winches you can only go with one notch and stop on your magnetic brake, and that causes your boom to sway. Then when you take the juice again one more notch,—by “juice” I mean electricity,—you pull it in and it vibrates.

Q. Was this block swinging? A. Yes, sir.

Q. And then what happened?

A. It carried away and just about then I started to shout. I shouted twice to look out, and I started stepping back when it came down and struck Mr. Cordray.

Q. How far away from him were you when it hit Mr. Cordray?

A. I'd say I was no more than two or three feet behind him. [163]

* * * * *

(Testimony of Walther Gerst.)

Q. (By Mr. Poth): I'll ask you, Mr. *Peters*, when you were [164] standing where you were did you have reason to believe that you were in a position of danger?

A. No, sir, if the ship's equipment was in good shape I was in no danger whatsoever.

* * * * *

Q. (By Mr. Poth): Where was Mr. Cordray standing at that time?

A. Two or three feet in front of me, abreast of the hatch, the after end of number two hatch.

* * * * *

Q. (By Mr. Poth): Well, in so far as the gear was concerned that was being used there, was there any difference in the place where you were standing and where Mr. Cordray was standing? [165]

A. I didn't quite understand your question.

* * * * * [166]

Q. (By Mr. Poth): Well, I'll ask it this way: In your experience of forty years at sea are you acquainted with safe and unsafe places to stand aboard vessels during cargo operations and gear handling operations? A. Yes, sir.

Q. Well, I'll next ask you, what sort of a place was Mr. Cordray standing in at the time that this fell on him?

A. It was a safe place, or I wouldn't have been standing there myself. I was standing right in behind him.

Q. Now, after the accident what did you do?

A. Well, first of all I said, "Somebody better

(Testimony of Walther Gerst.)

take this fellow to a doctor, he's hurt," and I don't know who the fellows were that took him off the ship. I came back and the first thing I did, I looked the block over, looked at the splice and looked it all over, * * * * *

A. O.K. Then I took the rope gantline out of the block and I gave the block to Mr. Peters, the block and the remains of the strap to Mr. Peters.

Q. (By Mr. Poth): And how did you take this rope gantline out of the block?

A. Just rove it out by hand or pulled it out by hand.

The Court: How many feet of the rope passed through that block by force of your hand?

A. Well, I'd say I roved it out at least thirty foot, because you see it comes through and the two ends are tied together and you have to untie the knot.

The Court: That is sufficient.

Q. (By Mr. Poth): Did you cut the gantline rope? A. No, sir.

Q. What sort of a rope was it?

A. I'd say it was either three or three and a quarter inch circumference Manila rope.

Q. Did you put the rope on the dock?

A. No, sir.

Mr. Poth: I believe I have no further questions.

The Court: You may cross examine.

Mr. Howard: I would like to have Exhibits A-2 and A-3 shown to the witness.

The Court: That will be accorded to Counsel.

(Testimony of Walther Gerst.)

(The exhibits were placed before the witness.) [168]

Cross Examination

Q. (By Mr. Howard): Mr. Gerst, are you acquainted with a man by the name of Ahern?

A. Yes, sir. He was my partner that evening.

Q. What was his job at the time this accident occurred?

A. He was the winch driver at the time it happened.

Q. Was he driving the winches at the time the accident happened? A. Yes, sir.

Q. And do you know a fellow by the name of Rip O'Day? A. Rip O'Day, yes, sir.

Q. Was he there? A. No, sir.

Q. Now, getting back to this block and splice, the block before you, Mr. Gerst, the block that's before you, not the pictures, the block first.

A. Yes, sir.

Q. Nothing in that splice carried away, did it?

A. No, sir.

Q. Have you examined that block since the time of the accident until you appeared in court today?

A. Yes, sir.

Q. When?

A. Yesterday evening right there at that table, sir. [169]

Q. Last evening was the first time?

A. Yes, sir.

(Testimony of Walther Gerst.)

Q. Are you sure you saw it last evening and it wasn't today?

A. No, sir, last evening on the table right there, sir.

Q. I think the record will show that the block was produced this morning for the first time.

A. Was it this morning? It may have been this morning.

Q. Well, in any event you hadn't seen it between July 15, 1956, and when you saw it in court either last evening or this morning?

A. No, I haven't.

Q. And your recollection of the type of the splice is based entirely on what you saw on July 15, 1956?

A. Yes, sir.

Q. Did you have any particular occasion then to notice that splice?

A. Yes, sir.

Q. Why?

A. Well, I've always been splicing all my life and working around that kind of work and I'm always interested in the splice. It's just a matter of—like someone would look at an automobile. I've been around that work all my life and that's the first thing I noticed.

Q. You mentioned also about the block, that it was the same type but the one as you recall had a sleeve and a bolt [170] and a grommet on it, I believe. Is that correct?

A. Yes, sir.

Q. Do you recall what color the block was that you examined on July 15, 1956?

(Testimony of Walther Gerst.)

A. It was the same type as this and the same color, sir.

Q. The same color? A. Yes, sir.

Q. Now, you have talked about the block hanging free as you observed it just before the accident occurred. As a matter of fact, there were two pieces of three and a half or three to three and a half inch Manila line hanging down from that block, were there not? A. Two pieces?

Q. That is right. A. No, sir.

Q. There was a piece rove through the sheave in the block?

A. Yes, sir, that's right, sir.

Q. So there were two sections of rope hanging down?

A. The two bitter ends, yes, sir.

Q. And those were three to three and a half inch circumference Manila, were they not?

A. Well, offhand right now I'd say three to three and a quarter inch.

Q. And you say the block was swinging?

A. Yes, sir. [171]

Q. With that rope hanging down from it?

A. Yes, sir.

Q. These winches that are used are an improved type of winch, are they not? A. Yes, sir.

Q. Over the old steam winch?

A. They're not an improved type over the steam winch, sir, but it's an improved type of winch.

Q. It is an improved type of winch?

A. Yes, sir.

(Testimony of Walther Gerst.)

Q. Now, Mr. Gerst, would you please look at the two pictures before you. First before you look at those may I ask you this—— A. Yes, sir.

Q. On the morning of July 15th after this accident occurred did you have an opportunity to look up and see what the other end of this block and strap looked like that was still hanging from the tip of the boom? A. No, sir.

Q. You never looked up there?

A. I looked up, sir, but I—it's quite a bit off the deck there. I couldn't see.

Q. All right. Now look at the exhibits that are before you, the two pictures. Do you see a portion of a hatch tent gantline in those pictures? [172]

A. This picture was not taken at that dock, sir.

Q. No, I didn't say that it was taken at that dock, Mr. Gerst. A. Oh.

Q. Do you see a portion of a hatch tent gantline?

A. I can see some frayed wire up there, but whether that's the hatch tent gantline or not I wouldn't say, sir.

Q. Well, look at the next boom after there. Do you see a complete hatch tent gantline in one picture? A. Yes, sir.

Q. And on the one forward of that there appears to be some pieces of frayed wire?

A. You see, sir, I'm looking on this side—the way your pictures are, you're facing the picture there, where if you was looking from the other side I could give you a more definite answer, sir.

(Testimony of Walther Gerst.)

I'm looking at it from the wrong side of the boom.

Q. Will you state, if you can, whether those pictures depict the condition of the upper portion of the hatch tent gantline strap as you may have observed it casually after the accident on the morning of July 15th? A. I couldn't say, sir.

Q. It's possible that they do but you just can't say? A. I could not say positive, sir.

Q. Now, Mr. Gerst, you have expressed an opinion as to the [173] place where you were standing as being a safe place to stand? A. Yes, sir.

Q. You were a winch driver or hatch tender?

A. Hatch tender at the time, yes, sir.

Q. You have to be out on deck, do you not?

A. Yes, sir.

Q. You have to be real close to the winches and to the side of the ship so that you can convey signals to the winch driver, isn't that correct?

A. Not close to the winches. You're close to the operation of moving your cargo, yes, sir.

Q. Well, you can't be fifty or sixty feet away fore or aft on the ship? A. Oh, no, sir.

Q. You have to be within a very close distance to give your signals? A. Yes, sir.

Q. Now, Mr. Gerst, it's not necessary for a dock foreman to be there, is it?

A. Well, I wouldn't be no authority to answer that question, sir.

Q. It's not customary for Customs officers to stand there, is it?

(Testimony of Walther Gerst.)

A. I've seen Custom guards standing there, Custom guards [174] down in the hatch, sir.

Q. As a matter of fact, Mr. Gerst, it's customary for every effort to be made to keep any persons not directly involved with the stevedoring operation out from under the cargo-handling gear, isn't that true, as a safety precaution?

A. If they are in an unsafe place, yes.

Q. Yes.

A. If they are in an unsafe place.

Mr. Howard: That's all I have.

* * * * *

(Witness excused.) [175]

* * * * *

The Court: Will the doctor come forward and be sworn as a witness for the plaintiff. [117]

DR. BERNARD GRAY

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Poth): Will you state your name, please? A. Bernard Gray.

Q. And where do you live, sir?

A. 1110 34th Avenue South, Seattle.

Q. And are you a licensed and practicing physician and surgeon under the laws of the State of Washington? A. Yes, sir.

Q. And do you maintain offices in this city?

A. Yes.

(Testimony of Dr. Bernard Gray.)

Q. And where are those offices, Doctor?

A. In the Stimson Building, 1215 Fourth Avenue, Seattle.

Q. Do you practice any particular specialty?

A. Yes, bone and joint——

Q. What is that?

A. Bone and joint surgery.

Q. Bone and joint surgery? A. Yes.

Q. What education have you had, Doctor, to prepare you for the practice of your profession and specialty?

A. I graduated from the University of Manitoba School of [118] Medicine in 1935. I was an interne at the Winnipeg General Hospital. I was a surgical resident at the Deer Lodge Hospital in Winnipeg and the Seaview Hospital in New York City. I did three years of orthopedic, that is bone and joint, work at the Permanente Foundation Hospital in Oakland, California.

Q. And what societies or professional associations do you belong to, Doctor, in connection with the practice of your profession?

A. I belong to the American Medical Association and the King County Medical Society, I belong to the Western Orthopedic Association, I'm a clinical instructor in orthopedic surgery of the University of Washington School of Medicine.

Q. You're an instructor at the University of Washington School of Medicine? A. Yes, sir.

Q. And are there any other professional societies that you belong to?

(Testimony of Dr. Bernard Gray.)

A. Some others that aren't as important.

Q. Now, during your practice have you had occasion to see, examine and treat Jack V. Cordray, the plaintiff in this action? A. Yes.

Q. And when did you first see him, Doctor?

A. I first saw him on August the 20th, 1956.

Q. And did you take a history at that time?

A. Yes.

Q. And what was that history, Doctor?

A. I saw him in my office. He told me that he was hurt on July the 15th, 1956, on a vessel at Pier 48 in Seattle. He said that he was walking down the deck when a block came down from the end of a boom, struck him over the front of his right chest, and then the strap which was attached to the block struck him over the head and neck and jerking his neck. He said that he was in immediate distress and he was taken directly to the Swedish Hospital where he was admitted and remained for three days. During that time he apparently had considerable pain in his neck and in his back. He was under the care of a doctor at that time who applied a collar around his neck, and he had some physical therapy treatments.

He said that he resumed work on July the 26th, 1956, and worked two shifts as a foreman. He told me that when he reported back to his doctor's office on August the 17th, 1956, he was advised that the company had cancelled treatment and then he came to see me for treatment. At that time he told me he had been a longshoreman since 1939; he had sus-

(Testimony of Dr. Bernard Gray.)

tained an injury to his [120] back in 1949 which wasn't relieved until he had an operation on his back in 1950. He said that at that time he also developed pain down the right leg so that since 1950 he has done somewhat lighter work than he did before then. He said he had had no other serious injuries.

Q. Where was this operation performed on his back, Doctor?

A. His lower back. At the time I saw him he was working, he had worked nineteen hours the week before I had seen him, but he was having what appeared to be considerable trouble. He said that his neck was very stiff and painful and he complained of severe headaches which seemed to radiate from the back of the neck over the top of the head, and the pain also seemed to travel down the back between the shoulder blades at times. He complained of a constant ache in his lower back which he felt was more than he was accustomed to before this injury, and he had some ache in the right leg, but his main trouble was in his neck.

Mr. Howard: I beg your pardon, the last——

The Court: His main trouble was in his neck.

The Witness: His main trouble was in his neck.

Mr. Howard: Thank you.

A. (Continuing) At the time I saw him he was thirty-six years old, and one thing that I noticed was that he [121] moved around holding his head quite still, and he was wearing what I call a wrap-around collar. It's a type of neck brace. His height

(Testimony of Dr. Bernard Gray.)

was five foot eight inches at that time, his weight was 150 pounds.

Significant findings on examination were confined to his neck. I found that there was complete restriction of active motion of the neck in all direction. When I asked him to move his neck he felt that he couldn't move his neck in any direction. When I tried to test his neck by trying to get him relaxed and moving his head myself, I couldn't move it because it was resistant, and he said it was resistant because it was painful as well as stiff.

I found some evidence of some low back distress, but that turned out to be not significant because his low back subsequently cleared up fairly well.

At the time I saw him I made some X-rays. I made some X-rays of his neck. The significant finding in the neck was that there was what I call complete loss of the normal curve of the neck. The normal curve of the neck is a curve that is concave backwards and his neck on X-ray was straight, and that to me indicates spasm of the muscles and strain of the joints so that the neck is being splinted.

At that time I advised him to stop work. In [122] fact, I advised him to go into the hospital, and I put a more adequate neck brace on him, and I sent him into Providence Hospital on August the 28th and he remained in the hospital for approximately eighteen days.

The first thing I did for him in the hospital was to keep him in bed and put a neck halter on him

(Testimony of Dr. Bernard Gray.)

and put him in traction, using about ten or twelve pounds, I don't recall.

Q. (By Mr. Poth): How does this traction work, Doctor?

A. Well, traction is supplied through a halter which hangs them up this way. There's a spreader bar and then a piece of rope. It's applied with him lying down with his neck bent forward a little and his head on a pillow. The rope goes through a pulley over the head of the bed and there's about eight or ten or twelve pounds applied to it. The purpose is for continuous traction, to splint the neck to try and overcome the muscle spasm and try and open up the joints, and I kept him in traction for approximately twelve days. That gave him some relief from the pain but it didn't give him enough, and on September the 11th under a general anesthetic I manipulated his neck. I put his neck through a fairly full range of motion.

Q. Why is it necessary to give an anesthetic when you do that, Doctor? [123]

A. Well, for several reasons. In the first place, it might be extremely painful. The second thing is that I've got to get his neck completely relaxed so that I can put these joints through as much of a range of motion as I can to overcome all the muscle spasm, and under an anesthetic—and I want you to understand we don't force the neck under anesthetic. It's a question of how much pressure we can apply.

I found that I could bring his neck through a

(Testimony of Dr. Bernard Gray.)

full range of motion. That was associated with some creaking, but I got a reasonably good range of motion and that gave him a lot of relief for the first time, so that he could—at the time he was discharged from the hospital on the 15th of September he had much better motion. He was then given physical therapy treatments by a physical therapist, and that treatment consisted of heat and massage to his neck, stretching of the neck, using substantial amounts of weight.

Q. Where was that performed, that physiotherapy?

A. Most of that was given, I believe, by my physical therapist—or the physical therapist who does my work, Miss Garvin, in the Stimson Building. He might have had some in the Providence Hospital, I don't recall right now. And so that by the middle of October we had him on exercises of his neck to try and maintain this [124] range of motion. He was still having pain, especially when he turned his head, and I note on October the 17th that he was working and I thought I would release him to work fairly soon. No, he returned to work on October the 22nd, working two or three days a week.

His main complaints during that time were recurrent headaches, pain in the neck, especially on turning his head to the right, and he had an area of persistent tenderness and pain at the base of his neck just to the right of the lowest cervical spine. On November the 17th I put a needle in that

(Testimony of Dr. Bernard Gray.)

area and injected novocain and cortisone, which gave him some relief. He's been under my observation since that time.

In December I noted that his headaches were improving. He was still doing light work, as I note it, foreman's work, and I felt that he should wear his neck brace when he had trouble, and later on I gave him or supplied to him a head halter and spreader bar so that he could rig up a traction setup at home where he could stand up or lie down and put this rig on and give himself some of these stretching treatments.

In December of '56 I noted that he was doing light work. He was complaining of catching pains on the neck, especially on twisting his head.

On January the 9th I noted that he had a [125] flareup of his neck pain, which subsided after taking some time off.

In February he came in, his work had been harder and he was having more pain in his neck again. This is February, 1957. In fact, that's when I advised him to do this neck stretching every day at home or twice a day, and that gave him some relief again and he got a little relief from this flareup.

On April the 1st, 1957, I noted that he was working half time and when he was working half time he was feeling better than when he was working full time. And he had certain specific complaints. He was working on a bull. One of his complaints was that any jarring of the truck would bother him and

(Testimony of Dr. Bernard Gray.)

cause an aggravation of neck pain and headache so that he would quit work at times. He also complained of an ache down the right arm with numbness of the fingers which would come and go. At that time I found that rotation of the neck, twisting to the side, was limited, that when I bent his head forward he complained of a catching pain which would stop motion before it went through a full range, and he still had an area of tenderness.

I gave him another one of these neck injections on April the 15th into that area where he complained of his catching pain, and that caused a flareup for a few [126] days, which it well might, and then within a week he seemed a little better.

I've been watching him since that time. I haven't given him any particular active treatment except for a short period during the month of June.

I saw him on July the 9th and he told me that the last three weeks in June he had been much worse, that his work was somewhat harder, and he took eight days off and got relief, and he was still taking his neck stretching treatments twice a day.

I saw him on September the 3rd. He said he had taken a vacation and the strain of driving the car had made him worse, the strain of holding his head in one position, but the findings were the same.

I saw him on September the 23rd of this year. He told me that he had had the flu and had had to do a lot of coughing, and the coughing definitely made

(Testimony of Dr. Bernard Gray.)

him worse and caused pain to shoot down the right arm and into the last two fingers of the right hand, and at that time I noted some numbness in those two fingers.

I saw him last on October the 21st, 1957. His condition has been about the same for a number of months. His main trouble was that any jarring or sudden twisting caused a severe pain at the base of the neck just to the right of the midline and any exertion caused his neck to [127] hurt and give him headaches, and his symptoms apparently varied directly with the amount of work that he was doing. The less work he was doing, the less trouble he would have.

Q. In your opinion were the troubles you have mentioned that he's been experiencing caused by the accident of July 15, 1956? A. I believe so.

Q. What is your diagnosis of his condition, Doctor?

A. My diagnosis is strain of the cervical spine. It's a strain of the joints and ligaments of the neck. The second diagnosis is the probable damage to the disc between those vertebrae at about the level of the seventh cervical vertebrae,—that's the lowest disc in the spine,—causing a derangement of that joint and causing recurrent pinching of the nerves in that area.

Q. Have you been able to determine whether or not there is nerve root involvement here?

A. I believe there's nerve root involvement, yes.

(Testimony of Dr. Bernard Gray.)

Q. What are the mechanics of this type of a neck injury, Doctor? Just what happens?

A. Basically it's a strain, like a strain on any other joint in the body. Neck strains are usually worse. The neck is more flexible and there are more joints in the neck. In many ways it's no different than a severe ankle [128] strain, inasmuch as each individual joint is concerned, except that in the neck there are many more factors than there are in the ankle. There's the factor that the nerves that go down the arm and the nerves that supply the back of the head come out from the neck. There's the factor that the joints are—there are many more joints and they are more complicated. There's the factor that that neck is under tension every minute that you're up to hold your head on your shoulders.

What happens is that there's a strain of the ligaments and the capsules that hold the joints together and——

The Court: Ligaments and what?

A. The capsule. The joint is two bones forming a bearing with each other. The joint is held in place by a layer of tissue which is called the capsule which encloses it. That capsule is reinforced by special bands of thicker tissue and that thicker tissue is called the ligament, and when a joint is strained one of the things that is involved is this capsule, the thing that holds the joint together. In addition there could be damage to the disc between the bodies of the vertebrae. This disc is a layer of spe-

(Testimony of Dr. Bernard Gray.)

cialized tissue that acts as sort of a shock absorber. It contains strands of tissue on the outside holding together a [129] center which is under tension, and as one bone moves on the other this tension is transmitted from one side to the other, and with injuries the fibers around this disc can be torn and the center can bulge out in one area and cause pain. If it bulges through the torn fiber it will cause pain as it pinches off one of the central nerve roots.

The mechanism of these injuries is hard to explain. Basically it's a complicated joint injury. They notoriously persist for a long time, they often are permanent, and one of the reasons for the permanence is the fact that this disc is very easily involved, and another reason is that it's very hard to put that neck at rest because of the constant strain on the muscles and on the joints in every moment that you're up on your feet.

I don't know if I've made myself clear, but these things are common and notoriously chronic.

Q. (By Mr. Poth): What treatment can be given, Doctor?

A. The treatment of any neck injury is to put the part at rest at first, and this was done for Mr. Cordray. He was, I understand, hospitalized and put in traction or a neck support. And after the acute symptoms subside the treatment is to try and regain motion of the neck by exercises, by physical therapy, by manipulation, and [130] that treatment to some degree may have to be persisted in for a

(Testimony of Dr. Bernard Gray.)

long time because of the chronic nature of these injuries.

The treatment Mr. Cordray needs right now is basically the treatment he's giving himself. The first thing he is doing is trying to avoid neck strain. The second thing is that he uses a collar once in a while when the load of the head gets too heavy. The third thing is he's doing exercises to try to keep his neck freely movable.

Now, much of his improvement from now on will depend, of course, upon what nature does for him. If that disc degenerates and tends to dry up, as it will or as it often will over a long period of time, his neck may stiffen up a little at that point and he may get substantial relief of his symptoms. On the other hand he may remain the same as he is indefinitely, or he may get worse. If he gets worse, it will exhibit itself by more evidence of irritation of the nerves that go down the arm, and then he may require much more radical treatment.

Q. What would the more radical treatment be, Doctor?

A. That would be surgical treatment to attempt to relieve the pinching or the pressure on the nerves.

Q. And just what is done in the surgery? [131]

A. In surgery the nerve root where it comes off the spinal cord is exposed, and any pressure from the disc spreading from the midline is relieved by removing the disc. That is usually not done, especially in the neck, without doing some special tests

(Testimony of Dr. Bernard Gray.)

for it, and the tests themselves are distressing enough that we don't like to do them unless we feel we have to do surgery.

Q. By reason of these neck symptoms that he still has do you feel that he is physically able to do the ordinary work of a longshoreman on a steady basis, full time? A. No, sir.

Mr. Poth: May I have the two exhibits, your Honor, that I put in?

The Court: You may have all of them.

(Exhibits were handed to Mr. Poth.)

Q. (By Mr. Poth): I'm going to show you, Doctor, Plaintiff's Exhibit 1, which is a hospital bill from Providence Hospital,—two of them, one in the amount of \$159.50 and the other in the amount of \$426.25, and I'm also going to show you a bill from Swedish Hospital in the amount of \$96.45, which is Plaintiff's Exhibit 2.

(Plaintiff's Exhibits Nos. 1 and 2 were handed to the witness.)

Q. Referring now to Plaintiff's Exhibit 1, which is the [132] Providence Hospital bill, I'll ask you whether or not the charges set forth are reasonable and whether or not they were necessary for the treatment of Mr. Cordray?

Mr. Howard: I so stipulated this morning, your Honor, that they were reasonable.

Mr. Poth: And necessary?

Mr. Howard: And necessary.

Mr. Poth: I have no——

The Court: Is there anything else?

(Testimony of Dr. Bernard Gray.)

Mr. Poth: Counsel has stipulated, your Honor.

The Court: At this time we will take—Mr. Howard, will there be substantial cross examination?

Mr. Howard: Well, I would like to allow at least ten or fifteen minutes, your Honor.

The Court: The Court is not limiting you. I was merely inquiring to think about the convenience of the witness with respect to when the Court takes a recess. How long do you say you thought you would be?

Mr. Howard: I estimate ten to fifteen minutes.

The Court: I think we will proceed.

Mr. Howard: Very well.

The Court: Does anyone feel that you would prefer to have the recess now rather than at a reasonable time later? If so, will you let that be known? (No response.) We have had several delays today and I like [133] to try to accommodate the doctor witnesses when we can possibly do it, so I think we will proceed now.

Mr. Howard: While I'm examining to begin with may we have these marked for identification as exhibits?

The Court: That will be done.

Mr. Poth: I haven't concluded my direct examination, your Honor.

The Court: You have not?

Mr. Poth: No, your Honor.

The Court: I do not see how one could have misunderstood you on that, but you may proceed with further direct examination.

(Testimony of Dr. Bernard Gray.)

Mr. Poth: Thank you, your Honor.

Q. (By Mr. Poth): What has been the amount of charge that you have made for your services to date, Doctor?

A. My bill to date for all my treatment and for all the X-rays is \$544.00.

Q. That's \$544.00? A. Yes.

Q. And do you contemplate seeing him and treating him in the future, Doctor?

A. He should—yes, he should remain under medical observation, but I have no active treatment to offer him right now except as I said, the things that he is doing and to come in with his acute flareups. [134]

Q. Now, is this injury that he has received in your opinion permanent?

Mr. Howard: Just a moment. That's a leading question, your Honor.

The Court: It is sustained.

Q. (By Mr. Poth): Well, could you state whether or not, Doctor, in your opinion the injury that he has received is or is not permanent in its effect?

A. I feel that the effects of the injury are substantially permanent.

Q. And how is it, aside from the explanation which you've already given, how is it, if it is, that an injury of this type to a neck can be permanent and an injury to an ankle of a similar type be not permanent in its character?

A. Well, I might point out that many injuries

(Testimony of Dr. Bernard Gray.)

to the ankle without fractures are permanent, too, in that the ankle will give way easily. Many people have had ankle strain and seem to get along quite well walking on the level, walking along on gravel, so that an ankle injury can be permanent.

The Court: Get to this one just as soon as you can, Doctor?

A. Oh, excuse me. Well, I just wanted to point out that the question didn't necessarily make sense to me. [135]

The Court: Oh. He wishes you to clarify the question, Mr. Poth, if you can do so. Will you?

Mr. Poth: Perhaps I did not very aptly state the question, your Honor.

The Court: You may proceed.

Mr. Poth: Perhaps, your Honor, would you permit the court reporter to read it back?

The Court: Very well.

(The reporter read back Mr. Poth's last question.)

The Court: I wish you would state another question.

Mr. Poth: I think I'll strike the question.

The Court: Please do that. You may restate the question.

Mr. Poth: I'll restate the question.

Q. (By Mr. Poth): Injuries—well, why is a neck injury, if it is, more serious than an ankle injury?

Mr. Howard: Well, your Honor, that question

(Testimony of Dr. Bernard Gray.)

presupposes something that has not been testified to.

The Court: The objection is sustained.

Mr. Poth: I said "if it is".

The Court: I think you better find out if it is first. [136]

Q. (By Mr. Poth): Is this more serious than an ankle strain?

A. Yes. I thought I made that clear a little while ago when I discussed the mechanism.

Q. And briefly why is that, Doctor?

The Court: Did you indicate, Doctor, you have already explained why in a previous statement, or have you?

A. Yes, or at least I gave the reasons why, because it's a more complicated joint, because the disc has the question of nerves coming out, it's related to the entire mechanism of holding the head on the shoulders during every hour of the day.

Mr. Poth: I have no further questions.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Howard): Doctor, I believe you said you took some X-rays. Was that at the time of your first examination of Mr. Cordray?

A. I took X-rays then, yes.

Q. Did you take some thereafter?

A. Yes.

Q. When, please?

(Witness refers to X-rays.)

(Testimony of Dr. Bernard Gray.)

A. On May the 14th, 1957. [137]

Q. Was there any change noted in the skeletal formations between the first X-rays and the ones taken in May of 1957? A. Yes.

Q. And the nature of that, please?

A. There were less obvious effects of spasm, whereas at first the neck was quite rigid and there was a complete loss of the curve. Subsequently he seemed to have regained the curve, indicating that the acuteness of the affair was subsiding.

Q. How do spasms evidence themselves in X-rays?

A. It's the effect of the muscle spasm among other things that's evidenced by loss of the normal curvature of the relaxed spine.

Q. And would that account—the spasms would account for the loss of curvature rather than any traumatic injury, then?

A. No, not necessarily, because — of course, spasm is just part of an injury and the result of an injury, but when a joint is injured, that joint tends to put itself in a position of maximum relaxation to take care of the swelling. A better example I can give you is that when a knee becomes swollen it doesn't stay up straight, it usually becomes bent. When joints of the neck are swollen you usually lose the normal curve and the neck tends to become straighter. [138]

Q. Now, did you still have evidence of the loss of curve in the May, 1957 X-rays?

A. No, that had subsided.

(Testimony of Dr. Bernard Gray.)

Q. Was there any evidence or had it just subsided? A. Excuse me, sir?

Q. Was there any evidence of loss of the cervical curve in May of '57, or had it simply subsided?

(Witness refers to X-rays.)

A. I can't quite see the difference, but——

Q. Well,—— A. The curve——

Q. Perhaps I haven't made myself clear, Doctor. I thought by "subsiding" you meant that it had just lessened in degree. Was it still present in May of 1957?

A. Well, I don't think that the normal curve would reestablish itself, but at least he had a curve in these latter films whereas in these first films the neck was perfectly straight.

Q. Have you taken any more X-rays since May of 1957? A. No, sir.

Q. I presume that if you felt that his condition had worsened that you would have done so, isn't that right?

A. If it had been indicated I would have done so.

Q. And you have indicated that his condition has been improving? [139]

A. His condition—no, I have indicated his condition has been stationary for a considerable length of time, with periods of exacerbation and periods of improvement.

Q. Doctor, at the time of your physical examination of this man in August of 1956 I presume that you performed the usual tests, neurological

(Testimony of Dr. Bernard Gray.)

tests, for reflexes and sensation and so forth, is that correct? A. Yes, sir.

Q. Did you find any abnormalities in connection with those neurological tests?

A. Only in the lower limbs.

Q. Could those have in any way been related to a neck injury? A. I don't believe so.

Q. Did you take measurements of the upper limbs, the arms, at the time of your first examination? A. No, sir.

Q. Did you subsequently make any measurements of the upper limbs, extremities?

A. I might have. I have no record of them.

Q. What would such measurements indicate if they were larger on one side than on the other, say if the left arm at the biceps was larger than the right arm at the biceps?

A. Oh, it might indicate a number of things. [140] Measurement just means the development of the muscle. It might indicate wasting of one muscle or it might indicate overdevelopment of another muscle, it might indicate he was predominantly right-handed or predominantly left-handed.

Q. Is it a commonly recognized test for loss of use or lack of use due to some injury?

A. Yes, if the test is indicated.

Q. Incidentally, at the time of your first examination, Doctor, did you make any notation in your records then as far as any numbness or loss of sensation in any of the fingers, speaking of your August, 1956 examination?

(Testimony of Dr. Bernard Gray.)

A. When I first saw him there was no evidence of any nerve involvement in the upper limbs.

Q. And the only time that manifested itself, according to your testimony as I understood it, was in April or May, I believe, of 1957—I beg your pardon. In September of 1957. On September 23rd.

A. April the 12th, 1957, I have a notation to that effect.

(Defendant's Exhibits Nos. A-5 and A-6 were marked for identification.)

The Court: Defendant's Exhibits A-5 and A-6 have been marked for identification.

Mr. Howard: On the basis of the pretrial order I offer those in evidence.

Mr. Poth: I don't believe we agreed on that, your Honor. I'll check. [141]

The Court: Then I will hear you at some other time. Proceed with this interrogation.

A. My first——

Mr. Howard: Might I have the identifications returned to me at this time?

The Court: Yes, if you wish to inquire about them. They are in the custody of the clerk.

Mr. Howard: Very well, I'll leave them with the clerk. I have copies that I can refer to.

A. No, my first specific notation was on April the 12th of '57, then April the 15th of '57 I noted it again.

Q. (By Mr. Howard): And then again I think you testified on September 23rd.

(Testimony of Dr. Bernard Gray.)

A. Well, he's had it ever since.

Q. Yes.

A. But I have no notation or no record of it prior to April of '57.

Q. Now, Doctor, you mentioned that there is some special test that you might resort to in a case involving neck or cervical injury before you went into the radical form of treatment or surgery?

A. Yes.

Q. Have those tests been given to Mr. Cordray?

A. No, sir. [142]

Q. You haven't considered it necessary to give him those tests?

A. No, I wouldn't do it unless his condition became worse and we couldn't control him by conservative methods.

Q. And you feel that his condition is under control now from a medical——

A. Well,——

Q. From a medical standpoint?

A. It's not as good as I'd like it to be and certainly not as good as he'd like it to be, but I don't have much more to offer him and I don't feel that—if he was getting worse rather than remaining stationary we would consider surgery, and that was the opinion of the neuro-surgeon that I consulted with on the case.

Q. Now as to your opinion as to his ability to work as a longshoreman or dock worker, I understand that it's your opinion that he could not work regularly full time.

(Testimony of Dr. Bernard Gray.)

A. Yes, sir, if the work involved—that's the full work of a longshoreman as I understand it.

Q. How about as a foreman?

A. Oh, I think that he could work as a foreman. He would have his periods of exacerbation, but he's going to have to live with it.

Q. How about as a bull driver or lift truck driver?

A. Well, bull driving apparently bothers him quite a bit [143] because of the turning that's required and because of the jarring, and of course he can work, but he's going to—as he works he's going to reach periods of exacerbation, he's going to have to lay off and rest up for a while and then go back to work again.

The Court: Will you give the witness an opportunity with a proper question to advise the jury of the meaning of the word "exacerbation"?

Mr. Howard: Yes.

Q. (By Mr. Howard): Would you explain that word, please?

A. It's simply a flareup.

The Court: A what?

A. A flareup of the symptoms.

Q. (By Mr. Howard): Doctor, have you any idea of what income Mr. Cordray has been able to earn monthly as a dock worker or a dock foreman since this accident occurred?

A. No, I don't know what his income is. I know that he's having—he doesn't put in a normal amount of hours a year. That's the only thing I've ever

(Testimony of Dr. Bernard Gray.)

discussed with him. I believe he requires twelve or thirteen hundred hours to get a vacation, and he can't get that in a year.

Q. Doctor, if the records showed that Mr. Cordray earned the sum of \$861.77 working as a dock foreman and a lift truck driver or a longshoreman in the month of May, of 1957, would you say that indicated he was working only half time? [144]

A. I don't know what the pay scale is. I don't know what his pay scale is.

Q. Or if in July he earned \$654.56 would you say that that indicated a loss of earnings due to his physical condition?

A. I don't know what his normal earnings would be on an hourly basis.

Mr. Howard: I think that's all I have.

The Court: Any other questions you wish to ask of this witness? I wish to finish with this witness so that he may be before the recess——

Mr. Poth: Excuse me. I'll just ask one question.

Redirect Examination

Q. (By Mr. Poth): If the record indicated that he worked less hours, your answer would still be the same?

The Court: I think you should say less than what, Mr. Poth.

Q. (By Mr. Poth): Than Mr. Howard stated.

Mr. Howard: I didn't state any hours, your Honor.

The Court: He stated a certain amount of [145]

(Testimony of Dr. Bernard Gray.)

earnings in certain months, if his earnings were a certain amount in certain months, I believe, Mr. Poth.

Mr. Poth: Well, I'll withdraw the question, your Honor.

Mr. Howard: That's all I have.

The Court: May this witness be excused?

Mr. Howard: That's agreeable.

Mr. Poth: Yes.

The Court: The witness may be excused and may permanently retire.

(Witness excused.)

The Court: Court is now at recess for about ten minutes.

(Short recess.) [146]

* * * * *

Tuesday, November 12, 1957, 10:05 O'Clock A.M.

* * * * *

The Court: The plaintiff may now proceed with the further work in plaintiff's case in chief.

Mr. Poth: Your Honor, at this time I would like to present to the Court and jury the testimony as contained in the deposition of Melvin M. Stewart, which was a deposition taken at the instance of the defendant for perpetuation of testimony for use at this trial.

The Court: You may do that. [177]

* * * * *

DEPOSITION OF MELVIN M. STEWART

The Court: Very well, Mr. Howard, that will be splendid, and you may now proceed. Can you not start agreeably to both Counsel on the second page, indicating for whom the witness was called and for whom the witness' testimony is now read?

Mr. Poth: Yes.

The Court: And offered.

Mr. Poth: Mr. Howard states for the record, "Let the record show that this deposition is being taken on behalf of the defendant pursuant to written notice served and filed in this cause. The deposition is being taken for the purpose of use at the time of trial."

And then Mr. Poth says, "It is not for discovery, but for perpetuation of testimony, is that right?" Mr. Howard, "That is right." Mr. Poth, "On what ground?" Mr. Howard, "The witness is going to leave town this afternoon."

And the first question after Melvin M. Stewart was duly sworn was a question by Mr. Howard as follows:

"Q. Will you state your full name, please?

"A. Melvin M. Stewart. [178]

"Q. And your address? "A. My home?

"Q. Your home, yes.

"A. 3423 West Blaine.

"Q. Seattle? "A. Seattle.

"Q. What is your age, Mr. Stewart?

"A. 39.

"Q. And by whom are you presently employed?

"A. Olympic Steamship Company.

(Deposition of Melvin M. Stewart.)

“Q. In what capacity?

“A. Assistant to the President and manager of their terminal operations.

“Q. How long have you been employed by Olympic Steam? “A. 21 years.

“Q. How long have you been serving as manager of their terminal operations?

“A. Oh, approximately 11 years.

“Q. What terminals are operated by the Olympic Steamship Company at Seattle?

“A. Now or then?

“Q. As of July 15, 1956?

“A. We were operating Pier 28 and Pier 49.

“Q. Were you a public terminal operator?

“A. Yes. [179]

“Q. And on what basis did you operate those terminals?

“A. We leased the facilities,—Pier 28 from Chicago-Milwaukee & St. Paul Railroad, and Pier 48 from the Port of Seattle. We perform certain terminal services on the piers in accordance with published terminal tariffs.

“(Two documents marked Exhibits A and B for identification, and attached hereto.)”

Mr. Poth: I wish to offer those two documents at this time.

The Court: They may be marked as plaintiff's next exhibits.

The Clerk: Plaintiff's Exhibit 3.

(Deposition of Melvin M. Stewart.)

(Document entitled Seattle Terminals Tariff No. 100 was marked Plaintiff's Exhibit No. 3 for identification.)

The Court: Plaintiff's Exhibit No. 3 was formerly referred to as the first one, and what was that first letter, Mr. Poth?

Mr. Poth: I believe there's two documents.

The Court: Yes. The first one?

Mr. Poth: The first one is later referred to as Tariff 100.

The Court: Could I find out what identifying number the deposition gives it? [180]

Mr. Howard: Exhibit A is Tariff No. 100, your Honor.

The Court: Let it be noted.

Mr. Poth: And this was produced by the defendant.

The Court: Tariff 100?

Mr. Poth: Yes, your Honor.

Mr. Howard: They are attached to the original of the deposition there. Tariff 100, your Honor.

The Court: Very well. You may proceed.

Mr. Poth: There was also 2-D, your Honor, which was marked for identification.

The Court: That will be marked Plaintiff's Exhibit 4.

(Document entitled Seattle Terminals Tariff No. 2-D was marked Plaintiff's Exhibit No. 4 for identification.) [181]

(Deposition of Melvin M. Stewart.)

“Q. As a public terminal operator, what vessels are entitled to use your facilities?

“A. Any ocean-going vessel that has need for the services that we perform.

“Q. Can you identify the documents before you, which have been marked for identification as Exhibits A and B?

“A. Exhibit A is Seattle Terminals Tariff Number 100, published by the Port of Seattle, and participated in by Olympic Steamship Company, Inc., which lists the rates, rules and regulations governing charges for account of vessels. Seattle Terminals Number 2-d, Exhibit B, is also published and participated in in the same manner, and the charges therein are generally [182] charges for the account of cargo.

“Q. Are you familiar with an accident occurring to a Mr. Cordray on July 15, 1956?

“A. I am, by reports.

“Q. And as of that time do you know whether these terminal tariffs that you have described, Exhibits A and B, were in effect covering the operations of Olympic Steamship Company?

“A. They were.

“Q. And did they cover your operations at Pier 48? “A. They did.

“Q. Did Olympic Steamship Company have any other contracts with Pope & Talbot, Inc., other than might be considered as part of these terminal tariffs? “A. No.

(Deposition of Melvin M. Stewart.)

“Q. Now, referring you again to these two tariffs, will you describe for us what types of operations are set up in those tariffs to be performed by your company, and for which charges are provided in the tariffs?

“A. Tariff Number 100——

“Q. That is Exhibit A.

“A. ——that is, Exhibit A, is basically charges against a vessel, and these charges are a dockage charge, which is a charge for the use of the berth alongside the pier. Second, there is a section [183] covering service charges which are charges made against the vessel operator for various services performed for him, which include certain functions of checking, and also certain facility use charges. A third section is handling which pertains to the physical moving of the cargo to and from ship's tackle to or from place of rest on the terminal.

“Q. When you say ‘to or from ship's tackle,’ to what point do you refer?

“A. I refer to the point on the pier where the ship's hook takes or receives cargo. (Pause.)

“Q. Would you continue?

“A. There are some other miscellaneous charges in there, such as the difference between straight time and overtime, and a man-hour table, setting forth rates charged for the furnishing of various miscellaneous services.

“Q. Now, this covers the charges principally against the ship in Exhibit A, being Tariff 100?

“A. That is correct.

(Deposition of Melvin M. Stewart.)

“Q. Now, passing to Exhibit B, describe generally what type of charges is included in that tariff?

“A. Well, Tariff 2-D, Exhibit B, covers charges which basically are charged in most trades against the cargo, wharfage charges, and charge for cargo facility crossing the pier. There are charges for car loading and [184] unloading which is a labor service basically in the loading or unloading of railway equipment; and there are other miscellaneous charges such as dock storage, wharfage, demurrage, and various conditions which apply normally to the cargo interest.

“Q. In these two tariffs, Exhibits A and B, is there any charge or any service provided for in connection with the physical operation of removing cargo from the hold of a ship to the dock?

“A. No.

“Q. As of July 15, 1956, when the S. S. P & T Adventurer was docked at Pier 48, did the Olympic Steamship Company actually do any of the work of loading or discharging cargo from the vessel?

“A. What date?

“Q. On July 14-15, 1956? “A. No.

“Q. Do you know who was performing stevedore service aboard the P & T Adventurer on July 15?

“A. That was the stevedoring company — the Seattle Stevedore Company.

“Q. Did Olympic Steamship Company employ

(Deposition of Melvin M. Stewart.)

or supervise any of the longshoremen working aboard the ship? "A. No.

"Q. Did the Olympic Steamship Company [185] actually do any of the work aboard the vessel, such as the movement of cargo aboard the vessel——

"A. No.

"Q. Or such as rigging and trimming and manipulation of the cargo handling gear?

"A. No.

"Q. Who would have done that work?

"A. The Seattle Stevedore Company.

"Q. What services did the Olympic Steamship Company provide as of July 14-15, 1956 with respect to cargo to be discharged from the S. S. P & T Adventurer by the Seattle Stevedore Company at Pier 48?

"A. We performed basically most all of the services I have just outlined as covered by these two tariffs.

"Q. Would that have involved the moving of cargo across the dock?

"A. It would include the handling of cargo, the receipt accountability and final delivery to the consignee.

"Q. Did Olympic Steamship Company have in its employ on July 14-15, 1956 one Jack Cordray?

"A. We did.

"Q. In what position or capacity was he employed?

"A. He was employed as dock foreman.

(Deposition of Melvin M. Stewart.)

“Q. What generally are the duties of a dock foreman?

“A. Well, he is a supervisory employee who directs the work [186] of the longshoremen on the terminal in the physical movement of the cargo.

“Q. Now, you mentioned directing ‘the work of the longshoremen on the terminal.’ Did the dock foreman have any duties with respect to the longshoremen working aboard the vessel who were employed by Seattle Stevedore Company?

“A. Not directly, no.

“Q. Did you also have a dock supervisor employed at Pier 48 on July 14-15, 1956?

“A. We did.

“Q. Who was that? “A. Richard Wallace.

“Q. What would be the nature of the duties performed by the dock supervisor at that pier?

“A. Well, he is in effect the superintendent of the pier, who, under the direction of the day superintendent, has to do with the location and placement of the cargo on the pier, and has to do with the receipt and ultimate delivery of the cargo.

“Q. I understand Mr. Wallace was working a night shift then? “A. That is correct.

“Q. Would it be correct to say that Mr. Wallace as dock supervisor was the senior representative of the terminal operator on Pier 48 during the night of July 14-15, 1956? [187] “A. Yes.

“Q. Did the Olympic Steamship Company give its foreman or its dock supervisor any instructions, either written or oral, as of July 15, 1956, with re-

(Deposition of Melvin M. Stewart.)

spect to going aboard ships which might be loading or discharging at Pier 48? "A. No.

"Q. Will you state whether or not an office is maintained on Pier 48 for use of the dock foreman and any others? "A. Yes, there is an office.

"Q. Where is this office located with respect to the berth at which the S. S. P & T Adventurer was secured?

"A. It is located approximately in the middle of the warehouse, adjacent to the midship section of the vessel, across the dock from that particular berth.

"Q. Who uses that office?

"A. It is used by the dock foreman for the preparation of his time sheets and other paper work that he is responsible for. It is normally used by the supercargo of the vessel for his paper work in dealing with what checkers he may have employed for the operation of the vessel.

"Q. You mentioned the supercargo. Would you describe just what the duties of a supercargo might be?

"A. A supercargo is an employee of the steamship whose job is the over-all supervision of the loading or [188] discharging of the vessel. He in effect lays out the work and hires the checkers for the vessel to keep track of the cargo and secure receipts, et cetera.

"Q. Did Cordray as the dock foreman have any responsibility in connection with the loading or discharging of cargo, that is, the actual physical load-

(Deposition of Melvin M. Stewart.)

ing and discharge of cargo from the steamer P & T Adventurer on July 14-15, 1956?

“A. No, not aboard the vessel. His only responsibility would be the coordination of dock handling to see that the proper cargo manpower was available to perform the dock function.

“Q. In other words, the responsibility of Mr. Cordray with respect to the cargo began after the cargo had been landed on the dock by the ship’s tackle being operated by Seattle Stevedoring Company? “A. That is correct.

“Q. Do you know whether or not Mr. Cordray was on the dock or on the deck of the ship at the time he was injured in an accident?

“Mr. Poth: Just a minute. How does he know, in the absence of being present? Was he there?

“Q. Were you there?

“A. No, I wasn’t there.

“Q. Do you know whether or not he was on the dock or on [189] the ship at the time of the accident?

“A. Only by reports that he was on board the vessel.”

* * * * *

“Q. Had Mr. Cordray worked for Olympic Steamship Company on occasions prior to July 15, 1956? “A. Yes.

“Q. And in what capacity?

“A. Both as a dock foreman and as a longshore lift truck operator.

(Deposition of Melvin M. Stewart.)

“Q. What is a lift truck operator? Will you describe that?

“A. He is a member of the Longshore Union who drives a lift truck.

“Q. Can you describe the lift truck? [190]

“A. A lift truck is a mechanical piece of equipment that lifts and transports normally loaded pallet loads of cargo and stacks them or handles them on the pier.

“Q. Now, you mentioned Mr. Cordray worked both as a lift truck operator and as a dock foreman. I will ask you, was Mr. Cordray a regular dock foreman? “A. No.

“Q. What was his regular work?

“A. Normally, a longshore lift truck operator.

“Q. Would it be correct to say he was an extra dock foreman? “A. Yes.

“Q. Has Mr. Cordray worked for Olympic Steamship Company since the accident on July 15, 1956? “A. Yes.

“Q. On more than one occasion? “A. Yes.

“Q. And in what capacity?

“A. Both as a dock foreman and as a lift truck operator.

“Q. Is he employed by Olympic Steamship Company at the present time, if you know?

“A. No, not on a regular basis.

“Q. Not on a regular basis? “A. No.

“Q. Mr. Stewart, do you expect to be in Seattle on Thursday and Friday, November 7 and 8, 1957?

“A. No, I do not. [191]

(Deposition of Melvin M. Stewart.)

“Q. Where do you expect to be?

“A. I expect to be at meetings of the Northwest Marine Terminal Association, which will be held in Tacoma.

“Q. Are you willing to waive the reading and signing of the transcript of this deposition?

“A. I am.

“Mr. Poth: I am willing to waive it.”

Mr. Poth: Next now is cross examination by myself, Mr. Poth, of Mr. Stewart, and the first question which I asked the witness is as follows.

(The reading of the deposition of Melvin M. Stewart was continued as follows:)

“Q. What ship was in there on July 15th and 16th?

“A. The P & T Adventurer.

“Q. Who owns the P & T Adventurer?

“A. Pope & Talbot Lines.

“Q. Now, I understood you to say that Olympic Steamship Company did not handle any cargo from the P & T Adventurer when she was there on the 15th?

“A. We handled the cargo from the ship's tackle. I thought the statement was worded, ‘on board the vessel.’ We didn't handle any on board the vessel.

“Q. Now, where did you handle the cargo?

“A. We handled the cargo from the end of ship's tackle.

“Q. Where would that be?

“A. Well, it is where the ship's hook comes over the pier apron, and the cargo is disconnected there

(Deposition of Melvin M. Stewart.)

by two ship employees called sling men. It is then picked up by a longshore lift truck operator, normally, and carried into the warehouse, where it is ultimately handled on to the skin of the pier and thence delivered to the consignee.

“Q. Now, is the cargo still in transit, still in movement, when it comes over the side of the ship and reaches the end of the ship’s tackle? Is there still any movement before it reaches the warehouse?

“A. Well, it is in the process of movement from the ship’s hold to ultimately the skin of the dock. Physically, it stops and is disconnected from the ship’s hook, and we then pick it up.

“Q. To the skin of the dock. Did you not call it the ship’s hook?

“A. The end of the ship’s tackle.

“Q. Is that the skin of the dock, or is it placed inside the warehouse, where it is ultimately piled and stowed?

“A. Placed inside the warehouse.

“Q. In other words, then we have the discharging operation, a continuous flow of the ship’s cargo from the hold of [193] the ship to its ultimate place of rest on the skin of the dock in the warehouse, is that right?

“A. That is right. We perform a part of that function.

“Q. What part do you perform and did you perform on the P & T Adventurer on July 15?

“A. We performed the functions of terminal operator. We were compensated for handling the

(Deposition of Melvin M. Stewart.)

cargo, a part of which is picking it up from the end of the ship's tackle and carrying it into the pier and putting it on to the skin of the dock. We received charges for cargo moving across the pier, which is wharfage. We received service charges from the vessel which cover various receiving, delivery, and paper work items that we prepare at their request.

"Q. Now, I want to ask you, on the 15th of July, 1956, when you helped unload the P & T Adventurer, where was the first place of rest of the cargo that came off that vessel? Was it at the ship's side at the end of ship's tackle? Was that the first place of rest?

"A. Well, the place of rest in a normal terminal procedure is the place inside the warehouse.

"Q. And it isn't the first place of rest at the end of the ship's tackle, is that right?

"A. That is correct. I mean the cargo has to flow from there. It is in the process of movement.

"Q. It is in the process of movement from the ship's hold, is that correct?

"A. Into the warehouse, yes.

"Q. All right. Now I am going to refer to Exhibit A, which is entitled, 'Seattle Terminals Tariff Number 100,' and I am referring to Section 3-A, entitled, 'Handling,' and the first part is also entitled, 'Specific Rules and Regulations Pertaining to Handling.' Now, I would like to have you read what is stated in there as a definition of a handling

(Deposition of Melvin M. Stewart.)

charge. I would like to have you read it into the record."

The Court: That document is not in evidence. You may proceed.

Mr. Poth: Yes, it is in evidence, your Honor. I've offered it. It's been marked.

The Court: It may have been marked, but I do not recall ruling on it.

Mr. Poth: I wish to offer it at this time.

The Court: What is it that you offer?

Mr. Poth: Tariff No. 100.

The Court: There are two things that have that reference. Which exhibit of this court do you wish to offer?

Mr. Poth: It would be 3, your Honor.

The Court: Mr. Clerk, will you take the two [195] exhibits in question and let Counsel see them.

(Plaintiff's Exhibits Nos. 3 and 4 for identification were handed to Mr. Poth.)

Mr. Poth: I wish to offer at this time Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4.

Mr. Howard: We also offer those, having produced them. We offer 3 and 4.

Mr. Poth: I wish to offer them at this time in evidence.

Mr. Howard: No objection.

The Court: Does that refer to Plaintiff's Exhibit 3 and also Plaintiff's Exhibit 4?

Mr. Poth: Yes, your Honor.

The Court: Each of them is now admitted.

(Deposition of Melvin M. Stewart.)

(Plaintiff's Exhibits Nos. 3 and 4 for identification, respectively, were admitted in evidence.)

[See pages 441-450.]

The Court: You may proceed to read the portion of the one that was referred to in the last question.

Mr. Howard: May I ask, your Honor, that the last question be re-read?

The Court: It starts at the bottom of Page 16 and ends at Line 4 on the top of Page 17.

Mr. Poth: Shall I commence reading the last question, your Honor? [196]

The Court: You may do so.

(The reading of the deposition of Melvin M. Stewart was continued as follows:)

"Q. All right. Now I am going to refer to Exhibit A, which is entitled, 'Seattle Terminals Tariff Number 100,' and I am referring to Section 3-A, entitled, 'Handling,' and the first part is also entitled, 'Specific Rules and Regulations Pertaining to Handling.' Now, I would like to have you read what is stated in there as a definition of a handling charge. I would like to have you read it into the record.

"A. (Reading) 'Handling Defined: A handling charge is a charge made against vessels, their owners, agents or operators, for moving freight from end of ship's tackle on the wharf to first place of rest on the wharf, or from first place of rest on the wharf to within reach of ship's tackle on the

(Deposition of Melvin M. Stewart.)

wharf. It includes ordinary sorting, breaking down and stacking on wharf.' ”

The Court: Would you cite the page of that exhibit, if it has a page, so that one can turn to that place in the exhibit and verify what has just now been read, Mr. Howard?

Mr. Howard: I don't have the exhibit before me, your Honor.

Mr. Poth: It states original page—— [197]

The Court: Let the one who is reading the answers state the place.

Mr. Poth: I'm sorry, your Honor.

The Court: And then if you object to the accuracy of the statement in that connection, let it be known, Mr. Poth.

Mr. Howard: That appears on original page 23 of Terminal's Tariff No. 100, being Plaintiff's Exhibit 3.

* * * * *

“Q. Now, is that a good description of what you did at Pier 48 for the P & T Adventurer, on the 15th of July, 1956?

“A. It is a good description of part of the job we did, yes.

“Q. All right. What other job did you do that is not mentioned there?

“A. Checking, receiving, and things of that nature.

“Q. I believe you are also referring, perhaps, to the [198] mooring at the pier?

“A. The charge for the mooring at the pier.

(Deposition of Melvin M. Stewart.)

“Q. But insofar as actual cargo handling is concerned, is that a description of the cargo handling operation that you performed for the P & T Adventurer?

“A. For the cargo that was handled on the pier, yes.

“Q. In other words, the first place of rest for that cargo is not where it is disconnected at ship’s tackle, but instead, the first place of rest, the handling for which you are paid, is its final place of rest in the warehouse? Is that correct?

“A. That is correct.

“Q. In other words, you can’t just dump the cargo alongside the ship and forget about it, can you? “A. No.

“Q. It has to be taken away to make room for the next load, is that right?

“A. That is correct. It has to be prepared for delivery to the consignee.

“Q. Now, I am going to ask you, were Mr. Cor-dray’s duties connected with this moving of the cargo from the ship’s side at the end of its tackle and the carrying of the cargo to the first place of rest in the warehouse?

“A. Yes, he directed the employees who physically did that work. [199]

“Q. Now, do you recall whether or not any of the vessel’s cargo, that is, the P & T Adventurer’s cargo, was loaded directly into railway cars when it was at your Pier 48 on or about the 15th of July, 1956?

(Deposition of Melvin M. Stewart.)

“A. Yes, some of it was discharged direct to railway cars.

“Q. Now, are you paid for that?

“A. We are not paid a handling charge. We are paid a charge on the basis of labor employed and equipment utilized under conditions as set forth in that tariff.

“Q. What labor do you employ when it is loaded directly into a car from a ship?

“A. Push-bull operators,—operators of a vehicle that push the cargo under and away from ship’s tackle.

“Q. Anybody else?

“A. A blocker who blocks the car when it is moved.

“Q. Anybody else?

“A. A foreman who supervises those employees.

“Q. And would Mr. Cordray have been such a foreman? “A. Yes.

“Q. On the date I have mentioned?

“A. Yes, he would. He would have knowledge of the cargo moving directly into a car or into the warehouse. All of those employees are terminal employees.

“Q. Now, I believe you mentioned a part of his job in seeing that cargo was moved to its first place of rest [200] from ship’s tackle was the coordination of dock handling with the work aboard ship of handling cargo, is that correct?

“A. I don’t recall that. That is correct. I don’t recall if I made that statement or not.

(Deposition of Melvin M. Stewart.)

“Q. But that is correct? He has to coordinate the two operations together, is that right?

“A. Well, he has to coordinate to have terminal employees and equipment available at the end of ship’s tackle to keep the cargo moving.

“Q. Now, is it ever necessary to achieve that coordination that a dock foreman go aboard the vessel? “A. Yes, it is.

“Q. And I will ask you whether or not it is the custom and practice for a dock foreman to go aboard a vessel to give orders and to make arrangements for this coordination of ship’s tackle and dock equipment?

“A. Yes, it is a common practice.

“Mr. Poth: I have no further questions.

“Redirect Examination

“Q. (By Mr. Howard): Did I understand your answer to Mr. Poth’s question correctly that no work was done by employees of Olympic Steamship Company as terminal operator on the occasion [201] that we mentioned, until the cargo had been landed on the dock from the ship by stevedores employed by Seattle Stevedore Company?

“A. That is correct.

“Q. And the actual disconnecting of the cargo slings that suspended the cargo from the ship’s tackle was performed by sling men employed by Seattle Stevedore Company?

“A. That is correct.

“Q. —who were stationed on the dock at the

(Deposition of Melvin M. Stewart.)

point so-called 'at the end of ship's tackle'?

"A. That is correct.

"Q. Were you present on the early morning of July 15th when the accident occurred?

"A. Not at the time the accident occurred, no.

"Q. Do you know of your own knowledge the reason for Mr. Cordray's being aboard the vessel on that occasion?

"A. I was advised.

"Q. No; of your own knowledge?

"A. Of my own knowledge? Well, I wasn't there, so, no.

"Q. Mr. Stewart, with whom have you had occasion to discuss your testimony given today, before this deposition was taken?

"A. I have discussed it with both you and Mr. Poth.

"Mr. Howard: That is all the questions I have.

"Mr. Poth: I believe I have no further [202] questions." * * * * * [203]

FRANK W. WICK

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Poth): Will you state your name, please?

A. Frank W. Wick.

Q. And where do you live, sir?

A. 10919 26th Avenue Southwest.

Q. And what is your occupation?

A. Longshoreman.

(Testimony of Frank W. Wick.)

Q. And how long have you been a longshoreman? A. A little over thirteen years.

Q. And were you working as a longshoreman on the morning of July 15, 1956?

A. If that's the morning Mr. Cordray was hurt, I was, yes, sir.

Q. And what ship were you working in connection with? A. The P & T Adventurer.

Q. And where was the P & T Adventurer located that morning? A. Pier 48.

Q. That's here in Seattle, Washington?

A. That's right.

Q. And what were your duties?

A. I was on the slings, what they call a sling man. [204]

Q. And who were you employed by?

A. Well, the Waterfront Employers. That's Pope & Talbot's ship.

Q. Now, you mentioned Waterfront Employers. Were you employed by any particular stevedoring company that's a member of the Waterfront Employers?

A. Yes, I was. I believe that was Rothschild, I believe. Now, I'm not sure about that. See, we work for quite a few different stevedoring companies and I wouldn't swear to which one it was.

The Court: Do you ever work for more than one during any one day, of any one working period?

A. I never have, no, sir.

The Court: You may inquire.

Q. (By Mr. Poth): Who pays you your wages?

(Testimony of Frank W. Wick.)

A. Waterfront Employers.

Q. Who paid you your wages for working that night of the 14th and 15th of July, 1956?

A. The Waterfront Employers.

Q. Well, now, what were your actual physical duties in connection with your work? Would you please describe them?

A. Well, if they are discharging cargo, we unhook the loads. If they are loading cargo, we hook up the loads.

Q. And in the discharging operation what happens when you [205] unhook a load? What's done with the cargo?

A. Well, that was general cargo. It would be on the spreaders. We have spreaders for that. They have cargo boards. It comes down on a cargo board and we have spreaders, one on each side of the cargo board that fits into slots, and we pull them out.

Q. Then what happens to the load?

A. Then it's picked up by the bull and taken in the warehouse.

Q. What's done with it in there, if you know?

A. Sometimes it's—they have dock gangs in there that discharge it off the boards. Sometimes it's put in there right on the boards and left.

Q. Now, did you—I believe you mentioned that Mr. Cordray was injured.

A. That's right.

Q. Did you see him get injured?

A. No, I didn't.

(Testimony of Frank W. Wick.)

Q. What first did you see or hear, if anything, that apprised you of an injury?

A. The first I heard was somebody on the ship hollered "Look out" and I glanced up and when I did, I——

The Court: Now wait just a moment. Ask him another question.

Mr. Poth: Yes, your Honor. [206]

Q. (By Mr. Poth): What did you see or hear, if anything, aboard the deck of the ship in relation to an injury, if there was one?

A. I heard——

The Court: Do you mean at or about the time of its occurrence?

Mr. Poth: Yes, at or about the time.

Q. (By Mr. Poth): I might ask you first to fix the time to the best of your recollection.

A. I would say around fifteen minutes to five in the morning, around that, close.

Q. And what did you see or hear, if anything, at that time?

A. They was winging in the gear and I heard somebody holler "Look out", and at that time I glanced up and I seen somebody kind of fall forward, and all I could see was just the shoulders and the head. There was a high rail there and I was down below on the dock.

Q. What hatch was that?

A. Number two hatch.

Q. Then did you happen to see any piece of

(Testimony of Frank W. Wick.)

gear of any kind, nature or description come out onto the dock? A. Yes, sir.

Q. And how did that happen to come out to the dock, if you know?

A. Well, the ship foreman hollered down to stand in the [207] clear, and he threw it on the dock.

Q. Had anybody said anything to the ship's foreman or not?

A. Somebody on the dock, I don't know who it was, wanted to see the strap.

Q. You mentioned a strap. Just what was this piece of ship's equipment?

A. Well, it was a part of the tent gantline. It was the tent gantline strap and block.

The Court: I think Counsel would like you to give the jury an idea of what the thing is that you refer to as a strap. What is that?

A. Well, it's a block with a cable on it. It's about, oh, four or five feet long, and it hangs on the boom, and it has a line running through it, a rope line which hooks onto the tent, and it's for the tent. That's the reason they call it a tent gantline.

The Court: A strap. I do not know what one of those things is that you have mentioned in your last statement is a strap.

A. Well, it's a cable. It's a cable about five feet long hooked onto a block.

Q. (By Mr. Poth): And where is the cable attached? A. On the bottom of the block.

(Testimony of Frank W. Wick.)

Q. And where is it attached on the other end, the other end from the block end, ordinarily? [208]

A. It's on another block. Sometimes that cable is made fast to the boom, one end of it, with a shackle, and the block hangs down.

Q. And what was this strap or cable that you mentioned, what was it made out of, the one that came over the side of the ship that night?

A. It was made out of steel.

Q. Did you have occasion to examine it?

A. I did.

Q. And please tell the circumstances under which you examined it, how you came to examine it.

A. Well, when it was throwed on the dock I picked it up, and I looked the strap over and I broke a piece off of the end of one of the strands and crumbled it with my finger.

The Court: You did not mention strands when you defined "strap". What thing is the strand you last mentioned or these strands you last mentioned, or are they a part? Are they a part of anything you mentioned before by any other name?

A. They're part of the cable.

The Court: You called something a strap a short time ago. Will you refer this strand or these strands to that and say whether or not it had any connection with the strap? [209]

A. A strand is part of the strap, your Honor.

The Court: Is the strand you mentioned a part of the strap you mentioned?

A. Yes, sir.

(Testimony of Frank W. Wick.)

The Court: You may proceed.

Q. (By Mr. Poth): And you mentioned that it crumbled, is that right? A. That's right.

Q. And what condition, if any, did it appear to be in?

A. It was rusted practically all the way through.

Q. Now, before you on the witness stand is a block with a strap or cable attached to it. Would you please examine it? I'm referring to Defendant's Exhibit 4, I believe it is.

The Clerk: Defendant's Exhibit A-4 is the correct reference to that.

Mr. Poth: A-4.

Q. (By Mr. Poth): And does that also have a strap on it, Defendant's Exhibit A-4?

A. It does.

Q. Now, does that strap resemble the strap which you examined there that night?

A. It's a similar strap.

Q. Is it different in any way than the strap which you saw?

A. Yes. This strap here is not rusted out. This strap [210] here has lots of life in it yet. That strap I saw was rusted completely through.

Q. Now, directing your attention to the core of that strap there, is there any similarity between the core of that strap on Defendant's Exhibit A-4, referring particularly to the rope core, and the core on the strap which you inspected there that night?

A. I didn't see any core in that strap. It was gone.

(Testimony of Frank W. Wick.)

Q. What happened to the block after you inspected it, if you know?

A. I laid the block down by the rail there and the dock foreman was there and he picked it up and took it inside of the warehouse. That's the last I seen of it.

Mr. Poth: I believe I have no further questions.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Howard): Mr. Wick, I take it from your testimony that you were part of the stevedore gang that was working on the ship.

A. That's right.

Q. You and your partner, the other sling man, were the two members of that gang who actually physically were on the dock? [211]

A. That's right.

Q. The rest of your stevedore gang, by whom-ever you were employed, were working aboard the ship?

A. That's right.

Q. And you were working under the supervision of Mr. Peters, the stevedore foreman for the ship?

A. That's right.

Q. You were not working under the supervision of Mr. Cordray, the dock foreman?

A. I was not.

Q. And the cargo when it came off the ship came to rest on the dock and then it was taken over by the dock operator, is that correct?

(Testimony of Frank W. Wick.)

A. They don't classify the dock as the place of rest.

Q. At the point where you were working work by the stevedores ended, is that not true?

A. After we unhook the load, of course we have to watch and see that it don't fall or something happens to it until it gets into the dock.

Q. And then at that point you turn it over to the dock operator? A. That's right.

Q. Do you know whether there was any hatch tent hung on the P & T Adventurer the night of the accident?

A. No, sir, there wasn't. [212]

Q. How many nights or shifts did you work on that ship? A. That was the second shift.

Q. On the previous night do you know whether there had been any hatch tents hung on the ship?

A. No, I don't remember.

Q. Who would do that work if any hatch tents were hung?

A. The stevedores, longshoremen.

Q. Did you have any opportunity to inspect the upper portion of this strap as you described it after the accident occurred?

A. Which part do you mean?

Q. The part that was still hanging from the end of the ship's boom. A. No, sir.

Q. You never looked up there?

A. It wouldn't have done me no good. It was too high to see it.

Q. Did you look up? A. Oh, yes.

(Testimony of Frank W. Wick.)

Q. Did you see——

The Court: Pardon me. From what point did you look up?

A. From the dock.

The Court: You were working on the dock?

A. On the dock. [213]

The Clerk: Defendant's Exhibits A-7 and A-8.

(Two photographs were marked Defendant's Exhibits Nos. A-7 and A-8, respectively, for identification.)

Q. (By Mr. Howard): Did you see any part of the strap hanging from the tip of the boom at that time? A. I did not.

Q. What did you observe as to the condition of the lower part of the strap which was thrown out on the dock by someone on the ship, in so far as whether the strands were separated or still intact or wrapped around each other?

A. They was—well, that's kind of hard to say. The only thing I could say, they wasn't unraveled as much as this strap here.

Q. Were they unraveled some?

A. Yes, they was unraveled a little.

Q. How long have you worked as a longshoreman, Mr. Wick? A. Thirteen years.

Q. All on the Seattle waterfront?

A. That's right.

Q. Will you tell me, please, what would happen on a ship such as the P & T Adventurer if the lower end of the gantline was left secured to a cleat or the

(Testimony of Frank W. Wick.)

rail of a ship and an attempt was made to wing in the ship's boom? [214]

A. Do you want my opinion, sir?

Q. I'm asking you from your experience what would happen.

A. Well, that would involve the condition of the strap or the condition of the rope at the time.

Q. What would happen? Would something carry away?

A. Oh, it's bound to carry away. The rope if it was in poor shape would carry away before the strap, or if the strap was in poor shape it would carry away before the rope. [215]

* * * * *

Q. (By Mr. Howard): In one of those pictures before you, Mr. Wick, I'll ask you if you can make out a hatch tent gantline in position?

The Court: Answer yes or no.

A. Yes, sir, I see part of one.

The Court: Will you turn to the back side of that picture and see where the clerk's identifying mark is made and state what that mark is?

A. A-8.

Q. (By Mr. Howard): A-8? A. Yes, sir.

Q. And is that just a part of the hatch tent gantline [216] appearing in that picture?

A. That's right.

Q. Which part?

A. Well, it's the upper part.

Q. I'll ask you whether or not that appears the

(Testimony of Frank W. Wick.)

same as you observed it on the P & T Adventurer on the morning of July 15th?

A. I didn't observe it that morning.

Q. Now will you please refer to the other picture before you, which would be A-7. I'll ask you whether or not you can observe in that picture a complete hatch tent gantline and block in place?

The Court: Answer yes or no.

A. Yes, sir.

Q. (By Mr. Howard): Yes?

A. Yes, sir.

Q. Is that the same kind or type of hookup that you observed on the P & T Adventurer on July 14-15, 1956, before the accident?

A. Well, I didn't observe the hookup there that morning.

Q. Is that the same kind of a block that was observed by you when the portion of the strap was thrown down to you on the dock?

A. If it's a single block, it is.

Mr. Howard: I offer Defendant's Exhibit A-7.

Mr. Poth: May I see it again?

The Court: It will be shown to opposing Counsel, each of them.

(Defendant's Exhibits Nos. A-7 and A-8 for identification were handed to Mr. Poth.)

The Court: A-7 is offered.

Mr. Poth: May I ask through the Court, Counsel, whether or not A-7 is an enlargement of A-3?

The Court: Can you answer that? If so, do so, Mr. Howard.

(Testimony of Frank W. Wick.)

Mr. Howard: Yes, it is.

Mr. Poth: Well, I have no objection to it.

The Court: A-7 is now admitted.

(Defendant's Exhibit No. A-7 for identification was admitted in evidence.)

[See page 460.]

Mr. Howard: And I offer A-8 as an enlargement of A-2, which is already admitted.

The Court: Do you wish to make a statement of attitude, Mr. Poth?

Mr. Poth: As to the pictures?

The Court: Yes.

Mr. Poth: Yes. The attitude——

The Court: No, the last offer of A-8, is there any objection to it? [218]

Mr. Poth: No, I have no objection.

The Court: It is admitted.

(Defendant's Exhibit No. A-8 for identification was admitted in evidence.)

[See page 461.]

Mr. Howard: May I ask that those be passed to the jury at this time?

The Court: That will be done.

Mr. Poth: I—yes, all right.

The Court: You may proceed, and proceed with the questioning, however.

(Defendant's Exhibits Nos. A-7 and A-8 were passed to the jury.)

Mr. Howard: Very well, your Honor.

Q. (By Mr. Howard): Mr. Wick, do you know where the hatch tent gantline was secured for the

(Testimony of Frank W. Wick.)

number two starboard boom aboard the vessel before the accident occurred? A. I do not.

Q. Do you know whether or not it was released before the accident occurred? A. I do not.

Q. Do you of your own knowledge know what Mr. Cordray was doing at the position that you observed him aboard the vessel immediately before the accident? A. No, sir.

Q. Do you know who was driving the winches?

A. No, sir.

The Court: At this point we will take about a ten minute recess. The jury will retire to the jury room.

(The following proceedings were had in the absence of the jury:)

* * * * *

Mr. Howard: May I inquire of the Court whether there will be a conference with respect to instructions?

The Court: Why, of course. The rules call for it. The rules always are applied in that respect. They always have been in the past since the rules have been in effect, and there will be in the future, I [220] believe, here in this department of the court. That will not be done until all the evidence is in, however. I will say to Counsel on both sides in that connection respecting the forms of their requested instructions, it looks to me like each side has sprinkled into the forms requested by them a great amount of argument unnecessarily, showing a partisan approach to the subject. It makes it much

(Testimony of Frank W. Wick.)

more difficult for the Court to adopt, for instance, Counsel's form, which this Court likes to do, on a given principle of law. I take special pride in trying to use or find it appropriate to use in respect of the requests on both sides the forms which Counsel have suggested, because if it is appropriate, why then Counsel know exactly whether or not the form is pleasing to them or to either of them. In this case the Court has that impression, that each Counsel has, everywhere they could, put in an argumentative statement. I say everywhere they could, I mean in several places, prominent places, and that makes it more difficult for the Court to make the kind of use of the form that Counsel would like the Court to make, I believe. So I wish you to have that in mind. [221]

* * * * *

(The following proceedings were had within the presence of the jury:)

The Court: All are present as before the recess. You may resume the interrogation of the witness.

Mr. Howard: May the witness be handed Exhibits A-2 and A-3?

The Court: That will be done.

(The exhibits were handed to the witness.)

Q. (By Mr. Howard): Mr. Wick, you have stated and identified a complete hatch tent gantline and block in the picture now admitted in evidence as Defendant's Exhibit A-7. Do you find before you a smaller picture corresponding to that, A-3?

(Testimony of Frank W. Wick.)

A. Well, this is so wrapped up around in the boom up there it's hard to tell what it is.

Q. Will you state, Mr. Wick, whether or not the complete hatch tent gantline and block that you did describe and find in Defendant's Exhibit A-7 corresponds, as to the block, with the block now before you on the witness desk as Defendant's Exhibit A-4, that is the block itself before you on the desk? Would you like to look at the larger picture? [222]

* * * * *

A. This don't look to me like a tent gantline block.

Q. (By Mr. Howard): Which one are you referring to? A. A-2.

Q. Would you please look at A-3?—I beg your pardon. Please look at A-2. In the background do you see a boom with some tackle, blocks and cables extending down from the tip of the boom?

A. Yes, sir.

Q. Can you identify one of those as a hatch tent gantline? A. I cannot.

Q. Would you look at A-3 and the corresponding boom in the background?

A. I don't see no tent gantline block there either.

Q. Well, then I'll ask you to look at Exhibits A-7 and A-8, the ones the jury have just completed their examination of. [223]

* * * * *

Q. (By Mr. Howard): Mr. Wick, before the morning recess you testified that you observed a

(Testimony of Frank W. Wick.)

complete hatch tent gantline in Defendant's Exhibit A-7. I would ask you now to take a pencil or a pen and mark the gantline that you were referring to.

A. I observe here part of the gantline, the broken part, hanging up at the tip of the boom.

Q. I ask you then if before the recess you did not also observe a complete hatch tent gantline extending from another boom?

A. Not a complete hatch tent gantline, sir.

Q. Well, now will you look at Defendant's Exhibit A-7 and as to the boom in the background I'll ask you if you do not observe a complete hatch tent gantline? A. I do not.

Q. What is the gear extending from the tip of the boom in the background down to positions along the rail of the ship?

A. That's the guy line.

Q. What is the block extending from the tip of the boom in the background?

A. That would be the gin block.

Q. And below that there are two other blocks. What are [225] those?

A. Well, the guy blocks, is what they are.

Q. Are both of them guy blocks?

A. They're both used for the same purpose.

Q. From the same boom?

A. From the same boom.

Mr. Howard: That's all.

The Court: Any redirect?

Mr. Poth: May I see A-7, please, your Honor?

The Court: That will be done.

(Testimony of Frank W. Wick.)

(The exhibit was handed to Mr. Poth.)

Redirect Examination

Q. (By Mr. Poth): Now, on the morning of the 15th of July, 1956, what position was the boom in on the P & T Adventurer when you last saw it? The boom I'm referring to is the yard boom, the one that had been extending over the dock.

A. The yard boom was swung in over the ship, inside of the rail of the ship, and it was also—if you're referring to that picture——

Q. No, I'm just referring now to the position of the boom as you saw it last.

A. The boom was high and inside of the ship, inside of the rail. [226]

Q. I didn't catch the——

A. Inside of the rail of the ship and high up.

Q. High up? A. Yes.

Q. What do you mean by "high up"?

A. Well, when they're working one end of the hatch, like the after end, they have to boom high so the——

The Court: Yes, but what do you mean by "boom high"?

A. Well,——

The Court: Do you mean you put both ends as far up in the sky as you can get them, or does it mean one end, or if so, to what extent, and so on?

A. The boom itself, the whole boom, or the top of the boom has to be high enough to reach one end of the hatch. If they're working the after

(Testimony of Frank W. Wick.)

end, of course that—then the gear and the boom is aft, then the boom has got to be higher. If they're working the forward end of the hatch and they want to reach the forward end, they lower the boom down to reach the forward end, and they was working the after end of the hatch at this time, so the boom was high up.

The Court: That is, do you mean the tackle end or the end that was fast to the ship's structure? A. The tackle end of the boom. [227]

The Court: And by that do you or do you not mean the end of the boom to which was attached the tackle through which lines and cables ran by means of pulleys and blocks, and so forth?

A. The end that was high——

The Court: Answer yes or no. Read the question, Mr. Reporter, "Do you or do you not," and so forth.

(The reporter read the Court's last question.)

A. Yes, sir.

* * * * *

Q. (By Mr. Poth): Now I'll ask you again. State whether or [228] not when the boom is high, as you have expressed it, it is closer to or further away from the mast or Samson post.

A. The tip of the boom where the blocks and gear is hanging, if the boom is lowered it would be farther away from the Samson post. If it was raised up it would be closer.

Q. Is it possible to lower these booms down

(Testimony of Frank W. Wick.)

to the deck of the ship where you can work on them? A. Yes, sir.

The Court: Would Counsel by a proper question give the witness a chance to advise this jury of what the words "Samson post" mean or refer to?

Mr. Poth: Yes, your Honor.

Q. (By Mr. Poth): What is a Samson post?

A. Well, it's referred to also as a king post. It's——

The Court: K-i-n-g, is that the way you spell the last word?

A. Yes. It's stationary, straight up and down, and anchored to the deck, and the boom itself is made fast with a ring around this Samson post with a king post through that to hold it in place so it can't move from that one position, only back and forth, swing back and forth.

The Court: Compare it to the original sailing ship device serving the same purpose as you conceive this [229] Samson post serves.

A. Well, your Honor, I don't know anything about a sailing ship.

The Court: You may inquire.

Mr. Poth: Now I wish, your Honor, to give the witness A-7.

The Court: It has been admitted in evidence, Defendant's Exhibit A-7.

(The exhibit was handed to the witness.)

Q. (By Mr. Poth): Now I'd like to have you tell the Court and jury what difference, if any, you see in picture A-7 in relation to the position of the

(Testimony of Frank W. Wick.)

boom there in that picture and the position that it was in when you last saw it on the morning of July 15, 1956.

A. Well, this boom here at this time is lowered a lot farther down than the one I seen, and also this here is hanging over the side, which it wasn't in that position.

Q. Now, as to the surroundings in which that picture was taken, are they the same surroundings that you last saw the ship in?

A. No, sir. This ship here is out in the water. She's not tied up to the dock from this side that I can see.

Q. Do you recognize any of the landscape in that picture?

A. Well, it looks like Alki Point over there.

Mr. Poth: I believe I have no further questions.

Recross Examination

Q. (By Mr. Howard): You have A-7 before you, Mr. Wick. Is there a Samson post showing in that picture? A. No.

Q. No Samson post? A. No, sir.

Q. You have referred to a gin block. Is there a gin block appearing in that picture?

A. I can't see it.

Q. You have referred to a guy. Is there a guy appearing in that picture? A. Yes, sir.

Q. Would you take a pencil or pen and draw an arrow to the guy to identify it? [231]

* * * * *

(Testimony of Frank W. Wick.)

(Witness marks on Defendant's Exhibit A-7.)

Q. (By Mr. Howard): In addition to the guy that you have marked is there also a preventer?

The Court: Answer yes or no.

A. That would be hard to say. There's a running part of that line there. I see another line there which could be the preventer, but there's also another running part onto the guy line which could be behind the rest of them lines there.

Q. (By Mr. Howard): Would you mark the word "Guy" alongside where you marked the guy on Defendant's Exhibit A-7?

(Witness marks on Defendant's Exhibit A-7.)

Q. Now would you again refer to A-7, and I'll ask you again to look at that picture closely and tell me whether or not there is not a Samson post or a king post appearing in the picture.

A. If that is a Samson post there with a ventilator on top, it could be. That there is a little unusual for that type.

Q. Is there a boom extending out from the bottom such as you described?

A. It looks like it is.

Q. Is there a block at the top from which there is some part of the cargo-handling gear extended?

A. Yes. [232]

Q. Would that not be a king post or a Samson post? A. It probably is.

Q. Would you mark it, please?

A. There's also a ventilator on there.

(Witness marks on Defendant's Exhibit A-7.)

(Testimony of Frank W. Wick.)

The Court: If the line comes to the point from a position off the picture proper, will you at that place, if it does not mar something else on the picture, write the word that says what it is?

A. I wrote here, your Honor, "Samson post".

The Court: All right.

Q. (By Mr. Howard): Now would you look, please, at Defendant's Exhibit A-8?

(The exhibit was handed to the witness.)

Q. Can you state whether or not there is a gin block visible in that picture?

A. Well, it's awful blurred if it is.

Q. And will you state again whether or not there is any hatch tent gantline or any part of a hatch tent gantline visible in either one of those pictures?

A. There is a part of a hatch tent gantline.

Q. Would you encircle with a pen the part which is visible on A-8?

A. Well, that would be kind of hard to do here.
(Witness marks on Defendant's Exhibit A-8.)

Q. And mark it "Gantline".

(Witness marks on Defendant's Exhibit A-8.)

Q. Now referring to the boom in the background of that picture, not to the one on which you have marked the gantline or the buy but the boom in the background, a portion of which is visible, I'll ask you if there is a portion of a hatch tent gantline visible in that picture?

A. This same one that I marked?

Q. A-8.

(Testimony of Frank W. Wick.)

A. Yes, sir, there's a part of a tent gantline strap here.

Q. Would you mark that, please?

A. I just got through marking it.

Q. I'm referring to the boom in the background.

A. There's only one boom on here.

* * * * *

Q. I was referring to the wrong picture. I beg your pardon, Mr. Wick. Refer to A-7, please. The boom in the background, I'll ask you if there is not a part of a hatch tent gantline appearing in that picture? A. I can't tell. [234]

Q. Again referring to A-7, is there not a second Samson post available on the side of the ship where the cargo is being worked?

A. Yes, there is.

Q. Would you mark that "Samson Post", please? A. If that is a Samson post there.

(Witness marks on Defendant's Exhibit A-7.)

Mr. Poth: Your Honor, the witness I believe stated, "If it is a Samson post." He's not sure if it's a Samson post.

The Court: The Court wishes you to mark only that which you say in your testimony is a Samson post, not that which Counsel may by asking a question whether it is or not intimate to you that he may think or not think that it is.

Q. (By Mr. Howard): Mr. Wick, before you mark it I will ask you as to the cylindrical object with a ventilator on top appearing toward the

(Testimony of Frank W. Wick.)

starboard side of this ship forward of the bridge or midship house in Defendant's Exhibit A-7, do you observe a block and a piece of the cargo-handling gear, a cable extending from a point towards the top of that cylindrical object?

A. There is a cable running there, but I'm not sure whether it's made fast to that cylinder object there.

Q. Where does it run to? [235]

A. It runs out to the boom.

Q. Will you state whether or not that is a king post or Samson post? A. I couldn't tell.

Q. Very well.

Mr. Howard: That's all.

* * * * *

(Defendant's Exhibit No. A-8 was handed [236] to the witness.)

Redirect Examination

Q. (By Mr. Poth): Where you have marked at Counsel's direction the word "Gantline", I'll ask you, are you able to tell from that picture what those strands you see there are?

A. They are strands from the tent gantline.

Q. From what?

A. From the tent gantline.

* * * * *

Q. (By Mr. Poth): I'll ask you, are you able to tell in that picture what that material is made of?

Mr. Howard: I object as repetitious.

(Testimony of Frank W. Wick.)

The Court: The objection is overruled.

A. No.

Q. (By Mr. Poth): You are not? A. No.

Q. I'll ask you, can you tell whether that is rope or wire? A. I cannot. [237]

Mr. Poth: I have no further questions.

Mr. Howard: No further questions.

The Court: Step down.

(Witness excused.)

* * * * *

FLOYD COPELAND

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Poth): Will you state your name, please? A. Floyd Copeland. [238]

* * * * *

A. 2302 32nd Avenue South.

Q. That's in Seattle here? A. Yes.

Q. And what is your occupation?

A. I'm a foreman on the waterfront.

Q. And how long have you been a foreman?

A. About fourteen years.

The Court: Give him a chance to say what kind of a foreman.

Q. (By Mr. Poth): And a foreman of what?

A. I'm a dock foreman.

The Court: Will you describe what a dock foreman does? What kind of work does he do?

(Testimony of Floyd Copeland.)

A. Well, you handle men, boarding, unboarding cargo, and handling cargo to and from the ships.

The Court: With respect to whose work, whose else's work, if anyone else's work, are you concerned as a foreman? Classify the type of workman whose work it is that you are a foreman in respect to.

A. I handle the bull drivers, I handle——

The Court: Who are they?

A. They are men——

The Court: How is their work classified, generally speaking? Classify it.

A. Well, they—— [239]

The Court: Are they seamen on board a ship or are they some other kind of a workman?

A. They are workmen on the dock or on the ship boarding, unboarding cargo, hauling cargo on to and from the ships.

The Court: Are they ever referred to as any particular class of workmen? If so, what class of workmen are they?

A. Well, they are longshoremen.

The Court: How are you classified, if you know, as to your work?

A. Well, I'm classified as a foreman.

The Court: Foreman of whom?

A. Of the longshoremen and the dock men.

The Court: You may inquire.

Q. (By Mr. Poth): And in the course of your employment as a foreman do you ever do any actual physical labor as a longshoreman? A. No.

(Testimony of Floyd Copeland.)

Q. What companies, if any, do you work for?

A. Well, I work for most all the employers on the Seattle waterfront.

Q. Do you work for Seattle Stevedoring Company? A. I have.

Q. And what have you done for Seattle Stevedoring Company? [240]

A. I've handled the bull drivers on loading and unloading ships for them.

Q. Now, when you worked for Seattle Stevedoring Company were you handling the longshoremen on the dock or the longshoremen on the ship?

A. On the dock.

Q. And who, if anyone, would be doing the longshoring aboard the ship, whose employees, when you worked for Seattle Stevedoring Company?

A. Well, they have foremen on the ship to handle the ship's work.

Q. No, I mean as to the employer's standpoint.

A. I don't get your question.

Q. Well, when you work for Seattle Stevedoring Company and you supervise longshoremen on the pier or dock handling cargo to or from a ship, who would be the employer of the longshoremen aboard the ship?

Mr. Howard: At what place and when?

Mr. Poth: When he is working on the dock.

Mr. Howard: Well, I object to the question, your Honor, unless it is fixed as to the time and place. They might have different arrangements at different locations.

(Testimony of Floyd Copeland.)

The Court: The objection is sustained.

Q. (By Mr. Poth): Well, can you remember the last time you [241] worked for Seattle Stevedoring Company?

The Court: Do you mean to ask him when it was if he does remember?

Mr. Poth: Yes.

A. I don't know the exact date. I've worked for them three or four times since the Port went out of the handling business.

Q. (By Mr. Poth): Do you remember where it was that you worked for them the last time?

A. I think the last time was at Pier 29.

Q. And do you remember the name of the ship?

A. No, I don't.

Q. Do you remember who employed the long-shoremen aboard the ship?

A. Seattle Stevedoring.

Mr. Howard: That's objected to, your Honor, unless it's fixed as to time.

Q. (By Mr. Poth): Do you remember the approximate time, the date?

A. Well, as near as I can remember I think it was around the middle of last month.

Mr. Howard: I renew my objection because of the time being considerably different than the time involved in this accident, and he has stated that the Port went out of the handling business. [242]

The Court: The objection is sustained.

Mr. Poth: Well, I'll ask it this way, your Honor.

(Testimony of Floyd Copeland.)

Q. (By Mr. Poth): How many years have you been on the waterfront?

A. Well, I've been a registered longshoreman and foreman since 1933.

The Court: On what waterfront? I think he is talking about——

The Witness: On the Seattle waterfront.

Q. (By Mr. Poth): Now, are you familiar from your experience as a longshoreman and as a supervisor, supervising foreman, with the employer-employee relationships in respect to the handling of cargo aboard ships and the complementary receiving of that cargo and handling it to its first place of rest on piers or docks?

A. Yes. Handling the longshoreman——

Mr. Howard: He has answered the question, your Honor.

The Court: The objection is sustained. You may ask him another question.

Q. (By Mr. Poth): Now I'll ask you whether or not there is an absolute custom that the longshoremen employed on the dock are always employed by a different employer than the longshoremen working aboard a ship at a particular [243] time?

Mr. Howard: Now, I object to that question on several grounds. First, because it is not fixed as to any time. Second, because it is not fixed at any dock. I will limit my objections to those.

The Court: The objections are sustained.

Q. (By Mr. Poth): Well, are you familiar gen-

(Testimony of Floyd Copeland.)

erally with customs on the Seattle waterfront, without respect to any particular dock or any particular time? A. Yes.

Q. Generally what is the custom and practice on the Seattle waterfront in relation to the employment by particular employers or by two sets of employers——

The Court: Do not make gestures, please, Counsel.

Mr. Poth: I'm sorry, your Honor. I'm very sorry, your Honor.

The Court: Proceed.

Q. (By Mr. Poth): ——between two sets of employers or one set of employers, what is that custom?

Mr. Howard: The same objection.

The Court: The objection is overruled.

Q. (By Mr. Poth): Would you please state what that custom is as you know it?

A. Well, as a rule the ship is worked by one company and the [244] dock is worked by another company, and they handle the cargo to or from the vessels.

Q. You say generally. Are there exceptions to that rule? A. Yes.

Q. What are those exceptions?

A. Well, sometimes——

Mr. Howard: My objection is renewed, your Honor.

The Court: The Court understands that Counsel intends to inquire regarding the customs and that

(Testimony of Floyd Copeland.)

he still does, but it does not so appear by his questions and it does not appear that the witness has been qualified by proper questioning as to the last question in the field with which the last question is concerned.

Mr. Howard: May I also make my objection on the basis that the question was whether there was an absolute custom without fixing time or place, to which I have objected, absolute custom. Now Counsel is inquiring about exceptions to a general custom.

The Court: The objection is sustained as to the last question, with leave to ask him further proper questions.

Q. (By Mr. Poth): I'll ask you, are you familiar with the custom and practice of employing employees, longshoremen, aboard a ship and longshoremen aboard a pier for the [245] American President Lines here in the City of Seattle?

Mr. Howard: I object to that as not relevant.

The Court: That objection is sustained.

Q. (By Mr. Poth): Well, I'll ask you, have you worked for American President Lines?

A. No, I haven't.

Q. Have you worked for Seattle Stevedoring Company? A. I have.

Q. Are you familiar with the custom and practice of the employment of longshoremen and stevedores aboard a ship and aboard a dock as of the period of time comprising July 15, 1956?

Mr. Howard: I renew my objection.

(Testimony of Floyd Copeland.)

The Court: The objection is sustained.

Q. (By Mr. Poth): Where did you work yesterday? A. I didn't work yesterday.

Q. Where did you work the last time you worked?

A. For Griffiths & Sprague at Pier 51.

Q. And what did you do there?

A. I was a foreman on the dock.

Q. And what was the name of the ship?

Mr. Howard: Objected to as not material or relevant.

The Court: The objection is overruled. If you recall the name of the ship, will you state it, Mr. [246] Copeland, if a ship was involved in your work. You have not—the objection is sustained.

Mr. Poth: Yes, your Honor. You have sustained the objection, your Honor?

The Court: I do, because it contains a factual assumption that has not been proved or testified to.

Mr. Poth: All right.

The Court: Namely, that there was a ship involved in this dock work that this——

Mr. Poth: All right.

Q. (By Mr. Poth): Was there any ship involved in that dock work?

A. Yes, there was.

Q. And what was the name of the ship?

A. H-e-i-y-o Maru, Heiyo Maru.

Q. Heiyo Maru, and where did you perform this work? A. At Pier 51.

Q. And who operates Pier 51, if you know?

(Testimony of Floyd Copeland.)

A. Griffiths & Sprague Stevedoring Company.

Mr. Howard: I object to this line of questioning as not material or relevant to the issues in this case.

Q. (By Mr. Poth): And who employed——

The Court: The Court has no way of knowing whether or not the question that he intends to ask [247] —the Court does not wish you to go on and take up a lot of time, valuable time, too, in asking questions that are not going to result in something material. I would like to know along what issue you wish to inquire eventually of this witness, if not now.

Mr. Poth: Well, I admit I've been a little surprised by the witness, your Honor, but what I wish to establish is that——

Mr. Howard: Well, I'm going to object to that.

The Court: It is a question of what issue in this case do you seek to inquire of this witness.

Mr. Poth: The issue in this case is to establish that——

The Court: No, the Court does not ask you to say what you are going to establish. The Court asks you to say on what issue do you seek information from this witness by proper interrogation.

Mr. Poth: On common employment in the interests of the ship.

The Court: Do you mean you are going to try to prove custom on some question? Have you pleaded that custom? If so, in what language have you pleaded it?

(Testimony of Floyd Copeland.)

Mr. Poth: I've stated that the plaintiff is a longshoreman and the defendant has taken the position that he is not a longshoreman because he was handling [248] cargo on the dock.

Mr. Howard: Well, that is the issue, your Honor, and Mr. Poth has fairly stated it.

The Court: The Court will hear proper questions upon that. I think you should find out in the first place whether in some field relating to that issue you hope to show this witness qualified. If so, proceed to ask him some questions.

Mr. Poth: Your Honor, I wish to show that often there is a common employer between the dock longshoremen and the ship longshoremen.

The Court: Do you seek to show a custom pleaded by you that there may be and often is a common employment? Where are the words in your pleadings which tender that issue?

Mr. Poth: That all goes to the evidence, your Honor, of the allegation that he is a longshoreman. Counsel has taken——

Mr. Howard: No custom is pleaded so far as I can recall, your Honor.

The Court: Do you maintain that under the law a custom must be pleaded before the issue is tendered? I ask Counsel to consider that further during the noon hour in view of the objection and let the Court know. I will meet with Counsel in this courtroom at 1:45. The [249] jurors are excused until two o'clock and will now retire.

(The following proceedings were had in the absence of the jury:)

The Court: I wish for Counsel to be prepared to first assist the Court to determine whether it is necessary to plead a custom expressly in order to be able to introduce evidence as to it, and then further is there one so pleaded here. That is not a very difficult question and both sides and the Court ought to be able to state their final position on it without very much effort, but I wish you to be certain of your position on it so that I can have the benefit of it at 1:45 here in this courtroom.

The Court and all those connected with this case are excused until two o'clock this afternoon, provided the Court will meet with Counsel in the case for the purpose limited as stated.

(Thereupon, at 12:08 o'clock p.m., a recess herein was taken until 1:40 o'clock p.m.) [250]
The Court: Call the next plaintiff's witness.

FLOYD COPELAND

resumed the stand.

The Court: You have already been sworn, Mr. Copeland.

Direct Examination—(Continued)

Q. (By Mr. Poth): Now, Mr. Copeland, where are longshoremen obtained to work on the Seattle waterfront?

A. Where are they obtained?

Q. Yes. [295]

(Testimony of Floyd Copeland.)

A. From the longshore hall.

Q. And who operates that hall?

A. Well, it's operated between the employers and the longshoremen.

Q. Whereabouts is it located?

A. At Western Avenue and University Street, I believe.

Q. How many employers, if you know, are there of longshoremen here in this port?

A. Pardon?

Q. How many employers of longshoremen are there in this port, if you know?

A. How many employers?

Q. Yes.

A. That employ longshoremen?

Q. Yes.

A. Oh, I have no idea. Forty or fifty, I would say.

Q. Can you tell me whether or not the longshoremen that are used on the ship and on the dock are called out of this same hiring hall?

A. Yes, they are.

Q. How are you employed? Who hires you?

A. I'm employed through the hiring hall.

Q. What hiring hall?

A. The foremen's hiring hall.

Q. Is that the same as the longshoremen's hiring hall? [296]

A. No.

Q. Where is the long—the foremen's hiring hall located?

A. First and Yesler.

(Testimony of Floyd Copeland.)

Q. And what companies have you worked for in the last several years here?

A. Well, most all of them. All of the——

Q. Could you name them for me, please?

A. Well, I've worked for the Port of Seattle and Olympic Steam, the Matson Line, Griffiths and Sprague, American Mail Line,——

Q. Just a minute, you're getting a little ahead of me. Griffiths and Sprague, American Mail Line,——

A. Rothschild Stevedoring Company.

Q. All right.

A. Griffiths and Sprague Stevedoring Company.

Q. All right. Who else?

A. And American Mail Line.

Q. All right.

A. I named that, I believe. And Rothschild Stevedoring Company, and the Salmon Terminals.

Q. The Salmon Terminals?

A. Yes. Also the Barge Line.

Q. Where?

A. The Barge Line at Ames Terminal.

Q. The Barge Line. What is this Barge Line operation, if [297] you know?

A. Well, they load and unload barges for Alaska.

Q. When you say "Barge Line", is that the name of a company? A. Yes.

Q. And do they own the barges or do they not own them?

A. Yes, the Barge Line I believe owns the barges.

(Testimony of Floyd Copeland.)

Q. And who hires the longshoremen there at the Barge Line? A. The Barge Line.

Q. The Barge Line, and where do the longshoremen work at the Barge Line?

A. On the dock and on the barges.

Q. All right. Now, Matson Line. Where is the Matson Line located, if you know?

A. At Pier 46.

Q. Is that the Matson Line that owns ships?

A. It is.

Q. Ships that go to Hawaii and Australia?

A. That's right.

Q. Now, do they employ longshoremen?

A. Yes.

Q. And where do they employ the longshoremen? A. From the longshore hall.

Q. And where do they use them?

A. On the ship and on the dock.

Q. Now, Griffiths and Sprague. What sort of an outfit is [298] Griffiths and Sprague?

A. They are stevedoring contractors and they also have Pier 50 and 51.

Q. Where do they get their longshoremen?

A. From the longshore hall.

Q. Then where do they utilize them?

A. On the ships or on the dock.

Q. American Mail Line. Is that the American Mail Line that we commonly know that operate the American Mail Line ships? A. That's right.

Q. Now, do they hire longshoremen?

A. They do.

(Testimony of Floyd Copeland.)

Q. Where do they get their longshoremen?

A. From the longshore hall.

Q. And where do they use these longshoremen?

A. On the ship and on the dock.

Q. Now, Rothschild Stevedoring Company.

What sort of a company is that?

A. That's a stevedoring company.

Q. And do they use longshoremen?

A. Yes.

Q. And where do they employ their longshoremen? A. The longshore hall.

Q. And how do they utilize them? [299]

A. On the ship or the dock.

Q. Would you please describe to us how a discharging operation of cargo works?

A. The discharging——

Q. So far as the flow of the cargo is concerned.

Mr. Howard: I object to that question on the grounds as heretofore stated. It's not specified as to the time or place and it hasn't been established that this witness was present at the time of the accident in question.

The Court: Sustained, subject to the right to supply additional information.

Q. (By Mr. Poth): Have you ever seen a ship unloaded? A. Yes, I have.

Q. Where is the cargo found, if there is any cargo, when the vessel comes to the pier here in Seattle?

Mr. Howard: I object on the same basis.

The Court: I think you ought to go into the

(Testimony of Floyd Copeland.)

knowledge of the witness before you ask him that question.

Mr. Poth: All right.

Q. (By Mr. Poth): How long have you been a longshoreman?

A. Well, I've longshored from about — steady from 1933 until about 1943.

Q. And then what happened?

A. Then I became a foreman. [300]

Q. And as a longshoreman—was this a foreman of longshoremen? A. Yes.

Q. And as a longshoreman and a foreman of longshoremen have you been around piers and docks and ships? A. I have.

Q. And have you ever seen any cargo in connection with those ships and docks?

A. Yes, I have.

Q. And have you ever actually engaged in the handling of the cargo? A. Yes.

Q. Have you observed where steamships keep their cargo? A. Yes.

Q. Where do they generally keep it?

Mr. Howard: I object to that form of question as being too general. We're getting back into the same realm that we were before, your Honor, custom and usage.

Mr. Poth: Well, your Honor, I'll withdraw the question.

The Court: That may be done.

Q. (By Mr. Poth): Do you know what the hold of a vessel is? A. Yes.

(Testimony of Floyd Copeland.)

Q. And what use does the hold of a vessel have, if anything? What is the hold of a vessel used for?

A. For stowage of cargo.

Q. Pardon? A. For stowage of cargo.

Q. All right. What is cargo?

A. Well, it's a lot of commodities.

Q. Pardon?

A. It amounts to a lot of different commodities.

Q. All right. Now, have you observed in your experience as a longshoreman what happens to cargo that's in the hold of a vessel when it comes in here to a pier in Seattle?

Mr. Howard: Same objection.

Mr. Poth: Well, I'll withdraw the question if Counsel objects and state something else in order to save the Court's time.

Q. (By Mr. Poth): This cargo which you have mentioned, do you ever see it in the holds of vessels? A. Yes, I have.

Q. And is that cargo—have you ever seen cargo taken out of the holds of vessels? A. Yes.

Q. And under what occasions have you seen it taken out? A. What occasions?

Q. Yes.

A. Well, I've seen it in a lot of different occasions, I've [302] seen them discharging cargo.

Q. Oh, I'll withdraw that question. Do they ever desire to unload that cargo when it comes in here in the hold of a vessel?

Mr. Howard: I object to that question, your

(Testimony of Floyd Copeland.)

Honor. We're getting back into the same thing again, your Honor.

The Court: That objection is sustained. Have in mind the Court's ruling on the——

Mr. Poth: Well, your Honor, it would save a lot of time if I could just ask him how they unload this cargo that's in these vessels.

The Court: That may be asked.

Mr. Poth: All right.

Q. (By Mr. Poth): In the loading and unloading of cargo what do you understand to mean by "first place of rest"?

Mr. Howard: I object to that.

The Court: That is sustained. If you want to ask him this question that was approved just a moment ago, you may do so.

Mr. Poth: All right. Will the court reporter please read the question back?

(The reporter read back the following statement by Mr. Poth: "Well, your Honor, it would save a lot of [303] time if I could just ask him how they unload this cargo that's in these vessels.")

Mr. Howard: I object to that question, your Honor. It's very much too broad. It's not tied down to this instance at this dock at this time.

The Court: The Court understood that you had no objection to it. If that is not the case, then you may proceed.

Mr. Poth: All right.

(Testimony of Floyd Copeland.)

The Court: I mean you may proceed to ask another question.

Q. (By Mr. Poth): What is a cargo-carrying vessel?

A. What is a cargo-carrying vessel? Well,—

Q. Just describe it, please.

A. Well, it's a ship that has holds in.

Q. Holes or holds? A. Holds.

Q. Holds. That's h-o-l-d? A. d-s.

Q. All right. And do you know what it's used for, if anything?

A. Oh, it's used for stowing cargo in and discharging it from the vessel.

Q. What means, if any, have you observed are employed to [304] take the cargo out of the holds of vessels?

A. Longshoremen are employed to take it in and take it out.

Q. All right. And do they use any sort of gear to do that?

Mr. Howard: Objected to as leading.

Q. (By Mr. Poth): Well, what do they use besides their own hands?

A. Well, they use cargo boards, sometimes they use slings, whatever they need.

Mr. Howard: I object to all this line of questioning on the grounds that it is sometimes they do this, sometimes they do that. I can't see that there is any relevancy or materiality to what they do on any other occasion or at any other locality than the dock

(Testimony of Floyd Copeland.)

and the time in question. We have witnesses here who have testified to that, your Honor.

The Court: The Court directs that you proceed to some other inquiry with this particular witness.

Mr. Poth: All right.

Q. (By Mr. Poth): Were you aboard or around the S. S. P & T Adventurer on the night of the 15th, 14th and 15th of July, 1956?

A. I believe I started that vessel and then they sent Mr. Cordray up there, and we had two ships at the dock and I told him to take the P & T vessel.

Q. What was your job that night? [305]

A. I had a ship on the other side, a Grace Line ship.

Q. Now, did you take cargo off your ship that night or did you load it out?

A. Well, I believe, as I remember it, it was discharging and loading, both.

Q. Now, the cargo that you took off of your ship, where was the first place of rest of that cargo?

A. On the dock was the first place of rest.

Q. Was that at ship's side?

A. No, it's in the dock.

Q. It was on the dock. Well, how was it taken away from ship's side?

A. I believe on the ship I worked it was taken away on boards.

Q. Through what instrumentality, if any?

A. Well, by lift bulls from the ship's tackle into the dock.

(Testimony of Floyd Copeland.)

Q. And who had charge of the men taking it away from the ship's side? A. I did.

Q. You did? A. Yes.

Q. Now, what job did Mr. Cordray have?

A. He was the foreman on the P & T ship.

Q. And what phase of the cargo operations did he have control of? [306] A. The dock.

Q. And what was done on the dock?

A. Well, they have just the bull drivers at night, they just work the bull drivers, and take the cargo from the ship and pile it on the dock.

Q. And where is the first place of rest of the cargo that comes from the ship's hold?

Mr. Howard: Objected to as repetitious.

Mr. Poth: I'm speaking about the P & T Adventurer, your Honor, now. I asked him about his ship.

The Court: Then the objection is overruled. If he knows what the answer to that question is with respect to this P & T Adventurer on the night in question.

Mr. Howard: I add that to my objection.

The Court: You cannot answer unless you know what it was on that occasion, Mr. Copeland. If you do know what it was on that occasion, then you can answer.

A. Well, it was general cargo, and I believe they had some steel on the ship, which they usually do.

Mr. Howard: I move to strike the answer.

The Court: The objection is sustained and the motion is granted.

(Testimony of Floyd Copeland.)

Mr. Poth: Well, let's see, what was my original question?

Q. (By Mr. Poth): Do you know whether cargo was being [307] discharged, from your own personal knowledge and observation, whether cargo was being discharged from the P & T Adventurer on the night of July 14-15, 1956, in Seattle, Washington, at Pier 48? A. Yes, it was.

Q. You saw it? A. Yes.

Q. Where was the first place of rest of that cargo? A. On the dock, or in cars.

Q. And was the first place of rest at the end of ship's tackle? A. No.

Q. And who had charge of taking the cargo from the ship's tackle? A. I did.

Q. On the P & T Adventurer?

A. Well, I did to start the ship, and then Mr. Cordray did after he came.

Q. You have been a foreman for fourteen years?

A. Fourteen years.

Q. And have you ever been a foreman on a ship?

A. No,—well, just a very few times.

Q. And you've been a foreman on the pier?

A. Yes.

Q. Now, in relation to discharging operations, do you have [308] occasion to go aboard a ship?

A. Yes.

Q. Why?

A. Well, to coordinate the work between the ship and the dock.

(Testimony of Floyd Copeland.)

Q. What do you mean by "coordinate"?

A. Well, a lot of times the different commodities of gear, or different commodities of cargo, you need different kinds of gear, and I go on there to see what kind of gear I'll need for the next cargo that's to come out, whether it's steel to the dock or steel to a car, or steel to the dock or piped to the dock or to a car, and then I'll know what kind of gear to get to take care of the operation.

Q. Now, on this particular night did you see Jack Cordray—let's strike that. In the morning of the 15th did you see him?

Mr. Howard: Before or after the accident, Counsel?

Mr. Poth: Your Honor, I was going to mention the accident but I was afraid Counsel might object. I'll ask it, then.

Q. (By Mr. Poth): Did you see him after the accident? A. Yes, I did.

Q. How long afterwards? [309]

A. Well, I imagine it wasn't over three or four minutes, I don't believe.

Q. Where was he?

A. Well, he was on the dock at the time I saw him.

Q. What did you first hear about the case? How did it come to your attention?

A. Well, someone called to me and said that—

The Court: No, never mind what they said, just called to you.

(Testimony of Floyd Copeland.)

Q. (By Mr. Poth): Someone called to you. Where were you?

A. I was on the other side of the dock, I believe.

Q. How far away?

A. Oh, maybe 100 to 150 feet.

Q. And when you saw Mr. Cordray what condition did he seem to be in?

A. Well, at the time I saw him he was in a dazed condition and he was complaining of his neck and his head and his chest.

Q. And what did you do with him, if anything?

A. Well, I took him up to the front office and called the hospital and I took him to the hospital.

Q. Now, did you see a block around there that evening?

A. Well, when I came on the dock someone had just thrown it on the dock, and I picked it up. They said, "There's the block that hit Jack, put it inside the dock," and I [310] picked it up and carried it inside the door and put it on the inside of the dock.

Q. Where was it when you saw it?

A. It was on the face of the dock.

Q. You put it where?

A. On the inside of the dock.

Q. Then what did you do?

A. Then I took Jack up to the front office and called the hospital and told them I was bringing him up.

Q. Did you examine the block at the time?

A. No, I didn't. I just looked at the end of it where it had broken off.

(Testimony of Floyd Copeland.)

Q. What did it look like, if you recall?

A. Well, it looked awfully rusted to me.

Mr. Poth: I believe I have no further questions.

The Court: At this point we will take a ten minute recess. The jury may now retire to the jury room.

(Short recess.)

The Court: All are present as before the recess. You may proceed.

Cross Examination

Q. (By Mr. Howard): Mr. Copeland, I understand that you worked as the dock [311] foreman in connection with the cargo from the P & T Adventurer on one or two nights before the accident to Mr. Cordray?

A. I started the ship, yes.

Q. Was there a stevedore foreman working then, do you know? A. On the ship, yes.

Q. And who was that?

A. Mr. Peters and Mr. Olson, I believe.

Q. By whom were they employed?

A. By Seattle Stevedoring Company.

Q. Now, when you were the dock foreman on these previous nights I take it that the Seattle Stevedoring Company was doing the work of discharging the cargo from the vessel.

A. That's right.

Q. And your work as dock foreman started as of the time the cargo was landed on the dock by the Seattle Stevedoring Company? A. Right.

(Testimony of Floyd Copeland.)

Q. So this reference to the first place of rest, I want to clarify that. Actually when the cargo came out of the hold of the ship it was moving over the rail of the ship by use of the cargo-handling gear of the ship until it was landed on the dock apron, is that correct? A. That's right. [312]

Q. Now, it stopped moving at that time, did it not?

A. Until the bull drivers pick it up and bring it to the dock.

Q. It stopped moving at that time, did it not?

A. Yes.

Q. And sling men then disengaged the cargo-handling gear that was used by the stevedoring company? A. Right.

Q. And as of that time the dock operator took over and moved the cargo to what you have described as the first place of rest, is that right?

A. That's right.

Q. Now, Mr. Copeland, you have described where longshoremen are obtained from, the longshore hall. In working on the dock and as a dock foreman are you sometimes engaged or involved in the work of taking cargo from a place where it had been stored on the dock and loading it into railroad cars? A. Sometimes, yes.

Q. In other words, it may have been stored in the dock for a day or a week or a month?

A. Right.

Q. And eventually when the parties are ready

(Testimony of Floyd Copeland.)

they order it loaded into railroad cars or trucks or whatever it may be, is that correct? [313]

A. Yes.

Q. Now, who does that work?

A. Longshoremen.

Q. Yes. Are they described as car loaders?

A. Sometimes, yes.

Q. Yes. Where do those men come from?

A. They all come from the longshore hall.

Q. The same place as the longshoremen come from that are used on the ship or in moving the cargo from the place where it is landed on the dock to the place of rest in the dock?

A. Longshoremen handle all the cargo to and from the vessels.

The Court: To what point? From the vessel to what point or points?

A. Well, sometimes they take the cargo out of boxcars and——

The Court: I am talking about from in discharging, my question concerns discharging. From the ship to what place or places?

A. Well, to the first place of rest on the dock.

The Court: You may proceed.

Q. (By Mr. Howard): After the cargo has laid on the dock, has been stored on the dock for a period of time, the party that owns or controls the cargo is ready to have [314] it moved out by railroad car, who does that work?

A. Longshoremen.

Q. Yes. You have also described the Barge Line,

(Testimony of Floyd Copeland.)

Matson Line, Griffiths and Sprague, American Mail Line and Rothschild International Stevedoring Company as being others that you've been employed by as a dock foreman. A. Right.

Q. And you've mentioned that they do both ship work and dock work, is that correct?

A. They do.

Q. Is it not a fact that sometimes they may be only doing the dock work and not the ship work?

A. Yes, there's companies that do that, yes.

Q. And other times the same companies might be doing only the ship work and not the dock work?

A. That's right.

Q. When you took Mr. Cordray up to the hospital after this accident on the morning of July 15th, how did you get to the hospital?

A. In my car.

Q. He was conscious? A. Yes, he was.

Q. Did he talk with you on the way up?

A. Yes, he did.

Mr. Howard: That's all I have. [315]

Redirect Examination

Q. (By Mr. Poth): Now, when men load cars on the dock, cargo that's on the dock, what name do you have for that? What type of work do you call that?

A. Well, we usually call it car work.

Q. Now, when men on the dock handle cargo moving to or from a ship, what kind of work do you call that?

(Testimony of Floyd Copeland.)

A. Well, it's handling of cargo to or from a ship.

Q. Is there any specific name that you call it?

A. Just general cargo, is all.

The Court: The work classification I think he is talking about.

Q. (By Mr. Poth): Work classification. You just called one car work, then you have cargo going to or from a ship that's being handled. What sort of classification do you call that in waterfront terminology?

A. Well, it's all longshore work, whether it's handled from cars or to cars or the ship, it's all longshore work.

Q. Now, is there any difference——

The Court: At that time when you were there was there any ship crewman participating in this operation which you were the dock foreman of?

A. Not that I know of, no ship's crewman.

Q. (By Mr. Poth): Mr. Howard mentioned to you about ship [316] work and dock work and some companies doing ship work part of the time and some of them doing dock work part of the time. I'll ask you whether or not in that connection does the same company ever do both the ship work and the dock work at the same time in relation to the same vessel? A. Yes, they do.

Q. Now, when cargoes come to this first place of rest on the dock and it's to be taken away by the consignee or for the consignee's benefit by other

(Testimony of Floyd Copeland.)

means than a railway car, what is that other means that's used?

A. Well, teamsters usually come in and pick it up and load it in their trucks and take it away.

Q. They load right from the pile?

A. Right from the pile.

Q. Would that be the pile of cargo that had been made by the longshoremen? A. Yes.

Q. Do the longshoremen load those trucks?

A. No.

Q. Now, in connection with cargo that's on the dock after the ship has been departed — after the ship has departed, and this cargo is piled up in its first place of rest and it later becomes necessary to move that cargo into a railway car, where are the men obtained for that? [317]

A. Longshoremen.

Q. Now, do you know whether or not — you called that car work, didn't you?

A. Yes, that's the term, yes.

Q. Do you know whether or not those men are paid the same rate of pay as when they are handling cargo directly from the ship on the dock?

A. Yes, they are, except the bull drivers.

Q. Pardon?

A. Except the bull drivers. They get a—there's a differential between truckers and bull drivers.

Mr. Poth: Perhaps, your Honor, I'm a little bit behind times.

Q. (By Mr. Poth): Has it always been that way? A. Well,—

(Testimony of Floyd Copeland.)

Q. That ship work and dock work were paid the same?

A. As far as the longshoremen are concerned, yes, but the bull drivers, they have a differential of 10 and 15 cents an hour, I believe. I think it's a little more than 15 cents now since the last contract.

Q. Is that between ship work and dock work?

A. Well, all the bull drivers receive the same amount of pay, whether they are loading cars or working ships, but the longshoremen, they receive the same amount of pay all the time. [318]

The Court: You may give the witness an opportunity with a proper question to find out whether anyone connected with this litigation was a bull driver.

Q. (By Mr. Poth): Was anybody connected with this litigation here a bull driver?

A. On the P & T?

Q. Pardon? A. On the P & T?

The Court: Name the persons in your question. Confine the inquiry to certain specified persons that are concerned here in this case.

Mr. Poth: I believe it's not important to the case, your Honor, and I'll withdraw any further questions and excuse the witness.

The Court: You may do that.

Mr. Poth: I have no further questions, your Honor.

Recross Examination

Q. (By Mr. Howard): Is Mr. Cordray a lift truck or bull driver? A. Pardon?

Q. Is Mr. Cordray a lift truck or bull driver?

(Testimony of Floyd Copeland.)

A. He does, yes.

Q. On this particular occasion of this accident was he [319] serving in that capacity?

A. No, he was serving——

Q. In what capacity was he serving?

A. He was a foreman.

Q. Dock foreman? A. Yes.

Mr. Howard: That's all.

Mr. Poth: Oh, one other question.

Redirect Examination

Q. (By Mr. Poth): Do bull drivers work aboard ship? A. At times, yes.

Q. What do they do aboard the ship?

A. Well, there's a lot of cargo now that is palletized and they stow palletized cargo and they stow heavy lifts of different kinds, and on the discharge a lot of times they use them in the hold on pipe and steel and beams and different packs of different commodities, heavy lift stuff.

Q. Are those the same bull drivers that they use on the dock?

A. No, they are hired by the stevedoring company for the ship, on the ship.

Q. I mean to say, can the same man be working on the dock one day and in the hold of a ship the next? [320] A. Yes.

Mr. Poth: I have no further questions.

Mr. Howard: Nothing further.

The Court: Step down.

(Witness excused.) [321]

* * * * *

Tuesday, November 12, 1957.

1:45 o'clock p.m.

(All parties present as before.)

(The following proceedings were had in the absence of the jury:)

The Court: If either one of you wishes to state anything for the record regarding this offered testimony to prove custom, I would like you to take that opportunity now.

Mr. Poth: Your Honor, I have searched the Washington Digest and the Federal Digest and also the authorities such as Wigmore and the American Institute, the American Law Institute, and I find nowhere is there any requirement that a business custom and practice or usage must be set forth in the pleadings. Starting first with Corpus——

The Court: Did you find an express statement that under a general denial the plaintiff may offer such testimony or, under a general allegation of unseaworthiness or negligence, custom bearing out the standard required or the standard reached is all that is required?

Mr. Poth: I did not, your Honor. Instead I found what seems to be the clearest statement which is set forth in 31 Corpus Juris on Evidence at Paragraph 180 at Page 881. [251]

The Court: Just a minute. 31 Corpus?

Mr. Poth: Yes, Secundum.

The Court: C.J.S., Evidence, Page what?

Mr. Poth: 881, Paragraph 180. That is *Corpus Juris Secundum*, your Honor.

The Court: Yes. Paragraph what?

Mr. Poth: 180.

The Court: You may proceed.

Mr. Poth: And it says there that, "The custom of a party or his employees or the course of conducting his business may become relevant and material in an action involving some claim or liability arising out of such business." Which seems to indicate that it may possibly become relevant during the course of a trial, but no mention is made anywhere that it has to be specifically pled.

The Court: I have not heard you read any mention of a statement yet that it may be introduced without any pleading of it specially or under what pleadings it may be properly introduced. That is what I am after.

Mr. Poth: Well, I have some more here, your Honor. This is from the American Institute, Law Institute of the American Bar Association, Volume 1, *Basic Problems of Evidence*, at Page 182. "Business, custom [252] or habit, that is what is customarily or habitually done in the regular course of business, is highly relevant in tending to show that the custom was followed in a particular instance, and evidence of custom or habit is universally accepted." That is another point.

Then I have the custom of a party—no, excuse me, your Honor. Then I have from *Wigmore* at Page 375—no, Section 375 to 379, in which it is referred to custom or usage, I see, "Course of con-

duct by a community or other body of individuals,” and it makes the same statement, that evidence is admissible.

Then there is the case of U. S. versus Ryno.

The Court: The last name is spelled how?

Mr. Poth: R-y-n-o—no, excuse me, your Honor, that’s not the citation.

The Court: If I could just have the volume and page I could maybe get it if——

Mr. Poth: I don’t have it with me. I also have numerous citations here which show that the Court can take judicial notice of customs and practice which exist in a given situation even where they are not set forth in the pleadings.

The Court: Did you get the statement that the Court is required to do that?

Mr. Poth: It’s a case from this court. “It [253] is common knowledge that logs are towed in waters near Port Angeles, Washington, and that logs or booms are anchored in nearby zones.” That’s Puget Sound Tug & Barge Company versus Olympic Forest Products Company, 21 Federal Supplement 940. And then there is an older one at 139 Federal 89. That’s from this court here.

The Court: The 21 Federal Supplement was what?

Mr. Poth: 21 Federal Supplement 940. There’s also the District Court of Washington, this is a case in 1905, where on libel for seaman’s wages on a coasting vessel libelants were entitled to the highest rates of wages paid at the port of departure for the time of their actual service, and though

there was no direct evidence as to the going rate of wages at that port, intimate commercial relationships existed between the port of departure and the port of destination, the Court would take judicial notice of such relations and in the absence of proof to the contrary would infer that the highest rate of wages at the port of departure——

The Court: We are talking about custom and usage now, I believe.

Mr. Poth: Yes. These cases are all collected under Custom and Usage——

The Court: That Wigmore citation is what? Please give me that. [254]

Mr. Poth: That Wigmore citation is Section 375 to 379.

The Court: Do you have the volume number of Wigmore? Wigmore is in several volumes sometimes.

Mr. Poth: Yes, but I believe on the outside of the volume it runs—the section numbers are given on the outside.

The Court: Section——

Mr. Poth: 375 to 379. The volumes are on the cover of the book, the section numbers.

The Court: You did not find a statement as to whether or not it is necessary to plead anything?

Mr. Poth: No, I did not, your Honor. I found no such statement. I found an indication that it was not. I might say, if I could explain what I'm trying to show here, your Honor, perhaps I could make my position a little clearer, more clear here, your Honor.

the dock, which is the stacking or piling in tiers on the dock, and that is all I'm attempting to show, and I just want to show the physical setup down there as to employment, and I realize we have become involved in custom and usage and things like that which I don't believe are actually material here.

The ordinary case on custom and usage where it might possibly be necessary to plead a custom and usage would be where there's a custom or habit of mailing a letter, for example, in a large office where it is important that something be mailed from some legal standpoint on a certain day and nobody can remember actually mailing that letter because there may be 200 employees in the office, so all they can testify to is the custom and usage, the custom and practice of mailing that letter.

That is a little different than I'm trying to show here. In fact, it's much different. All I'm trying to show is the employment relation on the waterfront, and I want to show it so there will be no confusion.

I believe Counsel is trying to on his side show that between the land and the sea in so far as handling the cargo is concerned there is a large chasm. For example, to quote the Biblical, the rich man who [258] looked up and saw Lazarus in the bosom of Abraham, he wants to make the gulf just that big, but what we attempt to show is that there is often a common employer, that there is no gulf, that it's all part of the maritime service to the ship of handling its cargo and——

The Court: I would like to know what you contend as to what the present state of the proof is as to what the contract here was. Was the stevedoring contract here to not only get the cargo off the ship but also pile it within the warehouse on the dock?

Mr. Poth: There were two stevedoring contracts, or shall we call them longshore contracts. The courts interchangeably use the terms "stevedore" and "longshore," and a longshoreman can be employed on the dock just as well as employed upon a ship. If I might go into stevedore——

The Court: I do not believe I need that. I have heard the two names interchangeably spoken all my life, at least all that part of it on the Seattle waterfront. You need not bother about that. I want to know what the proof in this case shows respecting what the situation was here according to your view of it.

Mr. Poth: The proof in this case made out, especially on the testimony of the witness here whose deposition was read, was that aboard the ship one [259] contractor had the ship work, that is the physical labor of taking the cargo off of the ship to the ship's side. It also shows that, regardless of whether you call this a tariff or a contract, the fact is that this tariff which has been introduced sets rates of pay and schedules for the handling of that cargo to its first place of rest upon the dock, and whether it's called a tariff or called a contract, there actually was a contract, because there was payment made, and I cannot see, your

Honor, how it can be argued that there was no contract when duties were performed and pay was made for it.

The simplest sale, we must all recall, is a contract, and here we had services furnished and paid for according to a prearranged schedule, and whether or not that was done by private negotiation or by a fixed or set tariff, that tariff itself still constituted a contract, and——

The Court: Do you not see very well that if you had pleaded the question that by custom and usage on the Seattle waterfront that the unloading of the vessel encompassed not merely the lifting from the ship and lowering onto the dock but also the further work of stowing it in a pile or in some place agreeably to the owner's facilities, cargo owner's facilities, inside the warehouse, we would not have this argument you have here? [260]

Mr. Poth: Yes, but, your Honor, I alleged in my complaint that he was a longshoreman.

The Court: I have been asking you ever since this question was first raised to point out in the complaint the words by which you tender this allegation which enables you to have the right to offer this evidence as to custom and usage on the Seattle waterfront.

Mr. Poth: Well, I have alleged, your Honor, that he is a longshoreman, and I wish to point out how longshoremen are employed upon the Seattle waterfront. I state in Paragraph IV on Page 2 of my complaint, "That as an independent contractor Olympic Steamship Company hired the plaintiff

as a foreman of longshoremen and entered upon the performance of its said contract, and the plaintiff at all times herein mentioned"—and I said here in Paragraph III, "That Olympic Steamship Company, having complete control and supervision of all operations pertaining to the loading and discharge of cargo from defendant's vessel, P & T Adventurer, in the Port of Seattle in the navigable waters of Puget Sound at Seattle, Washington." And they did have control of all loading and discharge of cargo on the dock.

The Court: The word "pertaining" may have some relationship to what you are trying to offer as practice and usage or custom and usage or whatever you [261] want to call it. I do not know whether it does or not, but it does not specifically say what kind of work it was that you expected to show the foreman was doing under that word "pertaining." Is there anything else that you allege?

Mr. Poth: Yes. I have also alleged that, "Plaintiff while in the course of his employment"—

The Court: Where is that?

Mr. Poth: This is Paragraph VI at Line 16. "—was obliged to traverse the weather-deck of said vessel," and so forth and so on. So I have alleged that he was a longshoreman, I have alleged that his employer was engaged in handling the cargo from the vessel, performing a maritime service, and I believe the cases that I have cited show that it makes no difference whether you're injured aboard the ship or on the dock, if you're injured

by the unseaworthiness of the vessel's gear, tackle or apparel, because whether or not you're employed on the dock or on the ship you are engaged in rendering a maritime service directly to the ship's cargo, and these cases that have been cited such as the Berryhill case, they are easily to be distinguished because in the Berryhill case and other cases of like ilk they were not performing, the plaintiffs or libelants were not performing a maritime service to the vessel such as handling [262] its cargo, and here we have a maritime service to the vessel of handling the cargo to the first place of rest.

The Court: Do you contend and seek to show by the proof in this case that the accident happened while the gear was either removing the cargo from the ship or while the gear was returning to the hold of the vessel for the purpose of removing more cargo from the ship that this line gave way, that this strap gave way, or what is the——

Mr. Poth: No, I do not contend that, your Honor. I——

The Court: What do you contend about the relationship between the place and kind of work of the plaintiff at the moment the accident happened and the discharging of cargo work of the ship?

Mr. Poth: I contend that he was aboard the vessel in the course of his duties to seek information as to this cargo, what to do next, to coordinate, like was testified to in this deposition, to coordinate the work between the ship and the dock of handling the cargo, and whether or not cargo was being

handled at this particular moment made no difference, any more difference than if a longshoreman in the hold was struck by a falling block or a falling beam caused by the unseaworthiness of the vessel and the winches happened to be not [263] working at that time.

In other words, they are covered all of the time while they are in the course of their employment with this warranty of seaworthiness. The only test is, are they performing the duties of a longshoreman, and that is the only test, your Honor, and are they in the course of their employment while they are performing those duties, and it makes no difference whether that work is on the ship or on the dock.

The only question in this case, if there is any question at all, is whether or not Mr. Cordray came aboard that vessel in the performance of his duties, because his duties were those of a longshoreman. If he came aboard for some private venture of his own, then he is not covered, of course, and if he was not in the course of his employment.

Assume that the work was over, the ship had been shut down, the men had been discharged, and he came aboard on a personal visit to see the mate or someone like that and the time for cessation of work had ended. But here the time has not as yet ended. He was still on the payroll. If he came aboard off of the payroll on his own time, then of course there would be no coverage.

The Court: Now you have used twenty-five minutes. [264]

Mr. Poth: I'm sorry, Your Honor.

The Court: I will hear the answering side. I will hear the defendant.

Mr. Howard: May it please the Court, going to Your Honor's question asked to Counsel before lunch as to authorities as to the necessity for pleading custom or usage, I would like to cite to Your Honor American Jurisprudence, Volume 55, under the heading Usage and Custom, Section 46, the heading of the section being Necessity for Pleading.

The Court: Now wait just a minute. The section of that is under what, Pleading, or what? Is this under the subject of Pleading in——

Mr. Howard: No, Your Honor, the subject is Usages and Customs.

The Court: It is not under Pleading or connected with evidence or pleading at all, is that right?

Mr. Howard: It is under Usages and Customs, Section 46, entitled Necessity for Pleading. This is at Page 308.

The Court: All right.

Mr. Howard: I'll read a quote from that section. "It is the generally accepted rule that a custom or usage general in character may be [265] proved without special allegation and may be given in evidence under the general denial. On the other hand, a custom which is not so general in its character that it would be presumed to have been known to the parties or of which a court will take judicial knowledge must be pleaded to warrant the acceptance of evidence of such custom."

I would like to read to the same effect the *Corpus Juris*. It's in 25 *Corpus Juris Secundum* under the subject Customs and Usages, Section 32 entitled Pleading, Subheading A, Necessity. This is at Page 123.

The Court: Page what?

Mr. Howard: Page 123.

The Court: You may proceed.

Mr. Howard: "General customs or usages of which the court will take judicial notice need not be pleaded, but particular customs or usages relating to a particular locality or trade and not judicially noticed by the court must be pleaded."

I would like to quote from a couple of cases to the same effect. *Cudahy Packing Company versus Narzisenfeld* in the Second Circuit, the citation is 3 Federal 2nd 567.

The Court: 3 what?

Mr. Howard: 3 Federal 2nd 567, and I'm [266] reading from Page 572. "Whenever a local usage or custom is relied upon to take a case out of a general rule of law, it has been held that the custom should be specially pleaded and cannot be shown under the general issue or general denial."

Similarly in the Third Circuit a case, *Central Railroad versus Schick*, appearing in 38 Federal 2nd 968, I'm reading at Page 971: "The offer of the defendants to present testimony of custom was properly rejected. The defendants did not plead usage or custom, and therefore such evidence could not be received."

And the Washington courts are to the same effect. I can give Your Honor a Washington case if you are interested in that.

The Court: The reason the Court spoke of it is because I thought when I was practicing as a lawyer before the courts of this community that especially in a defense pleading, and I thought the same was true in a plaintiff's pleading, custom had to be pleaded if it would vary in any way the normal contract relations or to in any way relate to the duties of employment or anything of that sort. I wish to see Mr. Howard through.

Mr. Howard: Now just a minute or so more, Your Honor. On the pleadings, I have checked them during the noon recess and I find nothing in [267] the complaint or in the pretrial order that could be considered as any pleading or any raising of an issue of a custom or usage. Mr. Poth has stated here this afternoon that he wants to prove what he says, that it is often that longshoremen have a common employer. I submit to Your Honor that what may have happened often in other cases is of no importance in view of the nature and quality of the testimony which we have coming in here which definitely indicates that we have separate operations and separate employment, namely, the Seattle Stevedore Company doing all of the work of loading or discharging cargo from the vessel to the place where it is landed on the dock, and then the testimony is clear even at this moment that there is another contractor, another terminal operator, namely, the Olympic Steamship Company, takes

over at that point and moves the cargo from the place where it is landed on the dock into the warehouse.

We therefore submit, and its a very important part of our position, that the man who was working for the dock operator when aboard the vessel was not performing the work of a longshoreman, he was performing the work of a dock operator, and namely a dock foreman.

As a matter of fact, in the pretrial order which was settled in this case, after considerable discussion as to the extent and the admissions that [268] were to be made, we finally ended up in Paragraph VI with a vey definite statement that, "In pursuance of its aforesaid handling of the said ship's cargo, Olympic Steamship Company employed the plaintiff, Jack V. Cordray, as a foreman over other shoreside workmen, employed by it handling said cargo on its said Pier 48."

Now, if the pretrial order is to mean anything, Your Honor, I submit that it is an admission by the parties right now that Mr. Cordray was a dock foreman employed by the terminal operator to handle the cargo after it had been removed from the ship and landed on the dock by another independent contractor, the stevedoring company, and then the terminal operator took over.

But in view of the authorities which we cite here, to get back to the point that was actually raised by Your Honor before the noon recess, I don't think there is any question but what the courts have uniformly held that a custom or usage must be pleaded

unless it is so general that the Court can itself take judicial notice of it.

The Court: Is there anything further you want to say?

Mr. Poth: Yes, Your Honor. I wish to say that Counsel and I evidently violently disagree as to the actual physical nature of this work. I don't [269] think this case should be resolved upon a confusion of terms.

The actual physical fact of the conduct of this work is that getting the cargo to the ship's side is only one-half of the longshore work, and whether or not one-half is done by one company and one-half is done by another company or whether the whole is done by one company is unimportant. The only thing that is of importance is whether or not there was actual handling of ship's cargo, and I think that this is a confusion of the situation which is unwarranted under the facts, and I think that the cases which I have cited are quite clear that a longshoreman on the dock, even if he is employed on the dock, is just as much a longshoreman and just as much entitled to a vessel's warranty when he is injured as if he is employed all the time aboard the ship.

I say this is an unwarranted confusion of terms and an unwarranted confusion of the facts, and I think it takes us away from the true issues of the case and is a stratagem that I don't believe should be considered by the Court.

The Court: I do not believe that the Court has before it anything other than to decide on this ob-

jection made to the offering of proof of custom here, and I have tried to give to Counsel the difficulty the [270] Court was having and they have not helped me a bit.

Mr. Poth: I think I can, Your Honor.

The Court: The objection is sustained.

Mr. Poth: Well, I would like to inquire of Your Honor as to whether or not, owing to the fact that I have alleged that he is a longshoreman and he was doing a longshoreman's work, whether I can inquire as to the employment practices of longshoremen in respect to the various companies and various vessels on the Seattle waterfront, which I am sure is not any different than any other part in these United States, and the Court can surely take judicial notice of it, and if Your Honor pleases, I can cite here the cases that show where judicial notice can be taken, and Counsel mentioned that he was citing—that he could cite a Washington case. I would like to have Counsel cite the Washington case and tell us what it says.

Mr. Howard: I will give that citation now, Your Honor.

The Court: All right.

Mr. Howard: Redmon versus Andrews, 147 Washington 390, the quotation from Page 393: "No such custom was pleaded, and therefore evidence to sustain it was inadmissible."

Mr. Poth: What were the—may I inquire [271] through the Court what the facts of the case were?

Mr. Howard: I can't give a summary of the

facts, Your Honor. I was working pretty fast in getting these citations.

The Court: The simple inquiry, if it turns out to be an inquiry, if Mr. Poth will meticulously confine any questions that he may ask of any longshoreman witness, you have already passed this with all of them except the plaintiff and this witness now on the stand. If the plain and simple question is asked of a longshoreman who was working here at this time as a member of one of these crews as to what kind of work he was doing, then it would be permissible in my opinion to ask him whether that was a usual or an unusual duty for him as a longshoreman to perform, but you certainly cannot go into any matter of proving a custom or a practice which was not pleaded.

Mr. Poth: Your Honor, I would like to ask this witness how he obtains his longshoremen, how they are obtained.

The Court: That has not been before the Court. Is there any objection to that?

Mr. Howard: Well,——

The Court: In other words, you seek to show that it is obtained through such and such labor sources? [272]

Mr. Poth: Yes, and then I want to show where they are sent and for whom they are sent.

Mr. Howard: Well, I would like to reserve my objections until I hear the questions, Your Honor.

The Court: Very well. You may bring in the jury.

Mr. Howard: Your Honor, I have a doctor waiting to testify. May we call this doctor out of order?

The Court: Yes, indeed. Bring in the jury.

(The following proceedings were had within the presence of the jury:)

The Court: May the record show that each and all of the jurors have returned to their places as before, and also that all parties on trial with their Counsel are present?

Mr. Poth: That's agreeable, Your Honor.

Mr. Howard: That's agreeable.

The Court: You may——

Mr. Howard: I would like to call Dr. Miller, Your Honor.

The Court: You may do that. The defendant is calling a witness as a part of the defendant's case in chief out of order, the plaintiff's case in chief being interrupted for that purpose to accommodate a witness. [273]

DR. JAMES WALTER MILLER

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Howard): Will you state your full name and address, please?

A. James Walter Miller. My address is 2845 West Viewmont Way, Seattle.

Q. And what is your occupation or profession?

A. I'm a physician and surgeon.

(Testimony of Dr. James Walter Miller.)

Q. And at what locality do you practice this profession?

A. I practice this specialty in Seattle at the Mason Clinic.

Q. How long have you been associated with the Mason Clinic, Doctor? A. Over twelve years.

Q. Will you state briefly what your education was for this professional work?

A. I'm a graduate of the University of Michigan Medical School in 1939. I interned at University Hospital in Ann Arbor, Michigan, from 1939 to 1940. I was an assistant resident in surgery at the same institution from 1940 to '41. I was an instructor in the University of Michigan Medical School in orthopedic surgery until 1945, when I came to Seattle. I'm an instructor in the Medical School here. I'm a diplomat of the American [274] Board of Orthopedic Surgery.

Q. And are you a member of any professional societies or organizations? A. I am.

Q. What are those?

A. I'm a member of the King County Medical Society, the American Medical Association, the American College of Surgeons, the American Academy of Orthopedic Surgeons, the Western Orthopedic Association, the North Pacific Orthopedic Association.

Q. Is your practice at the present time confined to any particular work?

A. My work is confined to the spine and the extremities. Orthopedics, in other words.

(Testimony of Dr. James Walter Miller.)

Q. Now, Doctor, did you at my request have an occasion to examine the plaintiff in this case, Mr.

Jack V. Cordray? A. I did.

Q. And when was that examination conducted?

A. On March 6, 1957.

Q. And have you seen Mr. Cordray on more than that one occasion? A. I have not.

Q. Where was the examination conducted?

A. The examination was conducted in my offices in the Mason Clinic. [275]

Q. Did you take a history from Mr. Cordray at that time? A. I did.

Q. Will you state what history you obtained?

A. I obtained the history that while he was working on July 15, 1956, he was struck in his right frontal area, that's in his forehead on the right side, by a block and strap. He told me that he was somewhat dazed but he was never unconscious. Two workmen prevented him from falling. He told me that he was taken to the Swedish Hospital where he came under the care of Dr. Darrell Leavitt. He was hospitalized there for two days. While there he was treated with ice bags on his head. He then returned as an outpatient and was seen by Dr. Cary and he was later seen by Dr. Leavitt. He also mentioned that he was referred to Dr. Bayless, who saw him on August 7th of 1956. He mentioned that he saw Dr. Leavitt in mid-August, that was the last he saw him, then he transferred his care to Dr. Bernard Gray, who hospitalized him on or about the 20th of August of

(Testimony of Dr. James Walter Miller.)

1956 in the Providence Hospital. He was there for twenty days. While there he was given physiotherapy in the form of heat and massage and traction upon his neck. He remained under Dr. Gray's care and at the time I saw him was receiving physiotherapy under his direction.

He told me that he returned to work [276] shortly after he was injured and he continued at his regular job as a fork lift operator. He stated that as a result of the injury he had a six weeks time loss and he claimed additional lost work as a result of the injury.

The week prior to my examination, that's prior to March 6, 1957, he told me that he had worked 26 or 27 hours. The week previous he said he had worked 31 hours.

He told me that his chief problem was residual pain and stiffness in his neck and headaches. He admitted that he was about 90 per cent improved over what he was at the time of his return to work the previous July. He——

Q. Did he describe to you any complaints that he had at the time of your examination in March of 1957?

A. He did complain of some pain in his lower back but stated that was minimal. He also mentioned that he had a cramping sensation involving the entire right side of his body. He also said that the headaches were pretty well confined to the back of his head and behind his ear in the mastoid region.

(Testimony of Dr. James Walter Miller.)

Q. When you obtained this history from Mr. Cordray in March of 1957 did Mr. Cordray describe to you or relate to you any previous accident resulting in any injury to his back? [277]

A. He did. He stated that Dr. Darrell Leavitt in 1950 had performed a disc operation. He stated that he had had mild residual difficulty with his lower back following this operation.

Q. What would you understand in laymen's language to be meant by a disc operation?

A. That's the removal of one of the cushions in the lower back. There are shock absorbers down there, and when they stick out too far we remove the offending portion.

Q. Did you make a physical examination of Mr. Cordray on that occasion? A. I did.

Q. Will you state what your findings were on that physical examination?

A. Examination on that date showed a man who appeared at a stated age. Examination of his neck showed very jerky movements on attempted motion, both when I asked him to move his neck and when I moved it. The patient was very resistant to all motions, particularly so when I rotated his chin to the right side. There was tenderness throughout the entire cervical spine, that's the neck area in behind, and he was also tender on each side of the cervical spine and also between his shoulder blades and the dorsal region. He was also tender throughout his entire lower back. [278]

Examination of the lower back, further examin-

(Testimony of Dr. James Walter Miller.)

ation of the lower back showed again the same jerky movements as were noted up in the neck. Here again there was some loss of forward flexion, about 30 percent. Other movements of his lower back were essentially full.

There was tenderness throughout the entire lower back, as I mentioned before, and he literally danced around, even when I made light pressure here or in his neck.

Q. Did you take measurements of the upper extremities, the right and left arms? A. I did.

Q. What is the purpose of taking those measurements?

A. That's to say if there's any wasting as a result of the injury or other cause.

Q. And what would wasting or a shrinking indicate to you as a physician?

A. Wasting or shrinkage would ordinarily indicate that something was wrong.

Q. What did you find on your measurements of the upper extremities?

A. On examination of his upper extremities the measurements showed that they were equal. In other words, there was no wasting or atrophy. [279]

Q. Now, did you also conduct certain neurological tests? A. I did.

Q. And what type of tests were those?

A. We test the reflexes, that's the reaction which you're all probably familiar with, when you tap certain portions of the body a jerk occurs involuntarily, and it shows whether the nerves are

(Testimony of Dr. James Walter Miller.)

intact to the brain and return and the reflexes which I tested and motor function——

Q. Well, were the reflexes—what was your finding on the reflexes?

A. The reflexes were normal, as well as motor function was normal, and also sensation to pin prick was entirely normal.

Q. What were you looking for on the motor power and sensation? What would an abnormal finding indicate as to those tests?

A. An abnormal finding would indicate evidence of nerve damage.

Q. Did you test the motion of the shoulder, the elbow or the wrists of Mr. Cordray?

A. I did.

Q. And what were your findings?

A. I found the shoulder, elbow, wrist and finger motion entirely normal.

Q. Now, Doctor, did you make any measurements of the lower [280] extremities, the legs of Mr. Cordray? A. I did.

Q. What was your finding?

A. They were of equal length and by the same token, as noted in his upper extremities, there was no evidence of wasting. Measurements of the thighs and the calf area showed them to be equal.

Q. Now, did you make any neurological checks of the lower extremities? A. I did.

Q. What type?

A. Here again I did the reflex examination, and

(Testimony of Dr. James Walter Miller.)

I found on the right side that there was an absence of his right Achilles jerk, showing——

Q. What did that indicate to you as an orthopedic physician?

A. That indicated that he had had previous disc trouble, as his history substantiated, and that was a residual of his nerve damage from his previous disc difficulty that he had had taken care of some years before.

Q. Did you undertake to conduct any other tests with respect to the legs? A. I did.

Q. Of what type?

A. I tested his sensation and I found there was —on the right side, that there was a scattered sensory loss that [281] was not confined to any one nerve distribution.

Q. What did that indicate to you, Doctor?

A. That indicated no serious nerve deficit. In other words, this didn't fit any particular pattern, this loss. We have—the sensory areas are well mapped out in the body.

Q. Did you make any other test or examination in that respect? A. I did.

Q. What was its nature?

A. I went through the usual leg tests that we carry out in the examination of people with back trouble, and I found that with simple flexion of his thigh on the body, that's just bringing the leg up, that the patient was very resistant, he would hardly let me do it, there were all kinds of jerky

(Testimony of Dr. James Walter Miller.)

movements and so on, and I could hardly examine the man, frankly.

Q. Going back to the absence of the right Achilles jerk and his scattered sensory losses, will you state whether or not from the medical and clinical standpoint those could be related to any injury in the neck area, the cervical area?

A. No, they wouldn't fit the pattern of a neck injury.

Q. Did you take any X-rays during the course of the examination of Mr. Cordray in March?

A. X-rays were taken under my direction. [282]

Q. And what findings did you make in those X-rays?

A. X-rays were taken of his neck and his lumbar spine, and they were interpreted by the radiologist and by myself as being entirely normal. There was no evidence of recent or old bony disease.

Q. Was there any evidence in those X-rays of loss of the cervical curve or the normal curve in the cervical area?

A. We felt that the curve was essentially normal.

Q. Was there any evidence of any injury in the level of the C-2 vertebra, the second cervical vertebra?

A. No, there was no evidence of any abnormality there.

Q. Now, Doctor, going back to the jerky movements which you described in connection with your examination of both the upper and the lower back

(Testimony of Dr. James Walter Miller.)

of Mr. Cordray on March 6th, will you state whether or not those are consistent with any evidence of a particular disease or an injury?

A. No, they are not characteristic of any disease or injury.

Q. What do they indicate to you as a medical examiner?

A. Well, they indicate that the patient is voluntarily not cooperating with the examination, or the examiner.

Q. As the result of your examination on March 6th of Mr. Cordray did you form an opinion, Doctor, as to whether or not there is any disability remaining from the accident which he reported having occurred [283] in July of 1956?

A. From my examination and going over Mr. Cordray's X-rays we found no evidence whatsoever of any abnormality other than to what I've testified, the residual nerve damage following his previous back trouble.

Q. As the result of that examination did you form any opinion as to whether or not Mr. Cordray was then in March of 1957 in a physical condition that would enable him to perform the regular work of a longshoreman?

A. Yes, I felt that he could continue at his regular job, and I felt also that he was not in need of further treatment.

Mr. Howard: That's all the questions I have, Your Honor.

The Court: You may inquire.

(Testimony of Dr. James Walter Miller.)

Cross Examination

Q. (By Mr. Poth): Doctor, I believe you mentioned that you found tenderness in his neck; is that right? A. Yes, that is true.

Q. And to what did you attribute this tenderness?

A. Well, tenderness is subjective and it's—I could find no reason why his neck was tender.

Q. Did you find any numbness in his right hand? [284]

A. No, I didn't find any numbness in his right hand.

Q. In the little finger and the one next to it?

A. No, I didn't find any numbness there.

Q. Do you have these neck cases in the course of your practice, Doctor? A. Yes, I do.

Q. And what do you do for them?

A. I treat them, as Mr. Cordray has been treated.

Q. Well, just exactly what is your treatment, Doctor? What do you do?

A. Heat, rest and traction.

Q. By "traction" do you put them in the hospital?

A. Occasionally. Often traction is administered under the direction of a physiotherapist.

Q. What is traction, Doctor?

A. That's pulling the neck with weights or other means.

Q. And how do you get rid of the tenderness?

(Testimony of Dr. James Walter Miller.)

A. The tenderness usually goes away with heat, rest, traction and time.

Q. Do you have ones in which the tenderness doesn't go away?

A. Not in this type of injury, no.

Q. Well, in any type of neck injury where there hasn't been a fracture, where there's been a severe strain of the neck?

A. Most of those recover. [285]

Q. What about the ones that don't recover?

A. There are not many that don't, as a matter of fact.

Q. Do all your patients recover, Doctor, when they have severe neck strains?

A. I think with time they do, yes.

Q. Well, since you've been practicing do you have any patients that haven't recovered yet from severe neck strains? A. Not that I recall.

Q. Every one of your patients has recovered from severe neck strains with no residual tenderness or pain? A. With time, yes.

Q. That is, every one that you have treated has recovered? A. As far as I know.

Q. What do you mean by as far as you know? Do you know or don't you?

A. Oh, I think I do. I mean it's not only my opinion, but most of these neck strains get better.

Q. I'm asking you, Doctor, about your own personal experience, not your own personal opinion. Do you know or do you not know whether all your patients have recovered from their neck strains?

(Testimony of Dr. James Walter Miller.)

A. I think I've testified that most all of them do.

Q. Well, let's talk about the ones that don't. I didn't ask about most all, I asked about whether all of them [286] have.

A. I again answer your question by saying that most of them do, and those that don't seem to get along.

Q. What happens, Doctor, to the ones that are not included in that category of most?

Mr. Howard: I don't believe the witness finished his answer to the last question.

The Court: Will you finish your answer, Doctor, if you have not already done so?

A. I again would like to simply say that most all of them recover more or less completely, and if they don't they are able to carry on gainfully, and I believe Mr. Cordray is doing that.

Q. (By Mr. Poth): You realize, Doctor, that "most" is a relative term. I'm asking you again, Doctor, what happened to those patients that are not included in that term "most" that you've just used?

A. I don't believe I can fairly answer that question.

Q. Did you examine Mr. Cordray for the purpose of treating him or for testifying here at this trial?

A. For testifying, if necessary, at this trial.

Q. Just for the purpose of testifying. How many times did you see him?

(Testimony of Dr. James Walter Miller.)

A. I saw him on one occasion only.

Q. And how much time did you devote to him?

A. Oh, I'd say at least an hour.

Q. About an hour? A. Yes.

Q. And were you there that whole hour or were there nurses coming and going?

A. Oh, there might have been some interruption. I wouldn't know.

Q. How many other patients did you see during that hour when you saw him?

A. Probably not very many, as a matter of fact.

Q. Not very many. Well, how many?

A. I can't answer that.

Q. Well, you had him there for an hour and you say you saw other patients. Now, during that hour you say you don't know how many. Well, did you see twenty patients besides him during that hour?

A. Mr. Poth, I didn't testify that I saw any other patients during that hour.

Q. I believe you said you——

A. I said I couldn't recall.

Q. I believe you said you didn't see very many.

A. I might have been interrupted. I cannot remember. I'm interrupted continually.

Q. Do you wish to say now that you didn't see any other than him? [288]

A. I wish to simply say that I might have been interrupted during his examination. I frequently am, with various calls from patients and so on. I do not recall whether I was interrupted or not.

(Testimony of Dr. James Walter Miller.)

Q. Now, Doctor, you examine all of the plaintiffs that oppose Mr. Howard's office, do you not?

A. No, I do not.

Q. Do you mean that Mr. Howard uses other doctors besides you?

A. Well, I'm sure he does. I've actually never been in court before with Mr. Howard, for your information.

Q. He has sent you a lot of cases for examination, hasn't he, Doctor?

A. I've seen several from his office, yes.

Q. How long have you been making examinations for Mr. Howard?

A. Oh, I would say for a year intermittently.

Q. For the last year, and how many patients have you examined for him in the last year?

A. I would say not more than six or eight.

Q. Have those other cases come to court yet?

A. I believe that some of them have been settled out of court.

Q. Are you expecting to go to court for their office on other cases in the future?

A. I expect to serve Mr. Howard or anyone else in the usual [289] fashion.

Q. Do you make examinations for other offices?

A. Yes, and for plaintiffs, too.

Q. Is it to whoever calls you first?

A. That's certainly not true, Mr. Poth.

Q. What are the mechanics of a neck strain?

A. The mechanics of a neck strain are simply

(Testimony of Dr. James Walter Miller.)

the neck goes through a greater range of motion than normal.

Q. Well, why does it go through a greater range of motion than—the normal, you say? Normal what?

A. Than it ordinarily would. The same as when you turn your ankle, it is forced through a greater range than normal. The same is true of a neck strain.

Q. What trouble, if any, does that cause?

A. That produces a stretching of muscles and ligaments and produces some pain.

Q. Does the neck have any joints in it?

A. Yes, of course it does.

Q. How many joints does the neck have?

A. Oh, it has eight in front and sixteen behind. It has twenty-four.

Q. Twenty-four joints? A. Yes.

Q. How many joints are there in an ankle?

A. Oh, that's one joint. [290]

Q. Now, what holds these twenty-four joints together in the neck?

A. Muscles and ligaments.

Q. And what happens to these muscles and ligaments when there's a sprain?

A. They are stretched.

Q. And what damage, if any, does that do?

A. Oh, they respond, of course, with pain, but ordinarily in time they will heal.

Q. Does the neck remain weak after it's been sprained like an ankle?

(Testimony of Dr. James Walter Miller.)

A. Well, as a matter of fact it doesn't.

Q. It gets stronger?

A. It usually gets better. It's more apt to get better than the ankle, as a matter of fact.

Q. In other words, then, you're better off if you have a neck that's not too good, if you can get it sprained, why it will be better than it was before, is that right, Doctor?

A. Oh, I don't think that's true. The answer to that is no.

Q. Now, in the normal person are both arms always of the same measurements?

A. Sometimes in the right—for example in a right-handed individual the right arm, the right forearm will be slightly larger than its mate, and the same will be true [291] in a left-handed individual, the arm that's used most, the major arm, if you will, will be slightly larger, sometimes about a quarter of an inch.

Q. The right arm, if a man is right-handed, his right arm is generally larger than the left?

A. Yes, a minimal amount, maybe, not always.

Q. Now, I believe you testified that Mr. Cordray's arms were exactly equal; is that right?

A. That is true.

Q. Now, did you determine whether he was right-handed or left-handed?

A. I don't believe I made a note of that, so I do not know.

Q. Did you find out how much he weighed?

A. No, we didn't weigh him.

(Testimony of Dr. James Walter Miller.)

Q. Did you find out what color his eyes were?

A. I didn't make any note of that, no.

Q. You didn't check his eyes?

A. No, I didn't.

Q. Now, where there's been a blow on the head and symptoms of headaches, don't you generally check the eyes?

A. I didn't check his eyes, no. I don't include that in my neurological.

Q. Well, isn't that a common practice in a neurological examination, to check the eyes?

A. Yes, that's commonly done. [292]

Q. For reaction to light, and——

A. Yes, that is commonly done.

Q. And check the pupils, and so forth, but you didn't do that. Did you check his heart?

A. No, I didn't.

Q. Did you check his blood pressure?

A. No, I didn't.

Q. Did you use a stethoscope?

A. No, I didn't.

Q. Well, what did you do besides X-ray him?

A. Well, I performed on this man as I've already testified. I specialize in the spine and the extremities, and I performed the usual examination that we carry out to evaluate this type of disorder in injured people. I did not give him a general medical examination. He was not sent to me for that purpose, nor did I think he needed one, as a matter of fact.

Q. You didn't think he needed an examination?

(Testimony of Dr. James Walter Miller.)

A. A general examination. If I had thought so, I would have had an internist examine him.

Q. So besides putting your hands on him and looking at him what did you do, Doctor?

A. Well, as I've testified, I had this man stand in front of me disrobed and I examined his neck for its motion, I examined his back and I examined his extremities in [293] the usual fashion as I've testified. I did not use any special equipment, but that is ordinarily not necessary for my type of examination.

Q. You mean the type of examination you make for Mr. Howard?

A. That's certainly not true.

Q. Well, now, when you had him take his clothes off and you had him stand there and you looked at his neck, what did you do, just look at it?

A. Well, I had him bend his head forward and I had him bend his head and neck backward and rotate it to one side and to the other, bend to one side and the other. I percussed his neck. I felt of his muscles, I performed the usual and customary neck examination.

Mr. Poth: I believe I have no other questions.

The Court: Any further questions?

Redirect Examination

Q. (By Mr. Howard): In making that examination, Doctor, did you check the neck for all movements in all directions and ranges?

A. I did.

(Testimony of Dr. James Walter Miller.)

Q. And similarly with the upper and lower extremities? A. I did.

Mr. Howard: No other questions. [294]

Recross Examination

Q. (By Mr. Poth): Oh, can you tell how a man's neck feels by looking at it with your naked eye?

A. No, you can't tell how it feels by just looking at it.

Mr. Poth: I have no further questions.

Mr. Howard: That's all I have, your Honor. May the witness be excused?

The Court: Any objection?

Mr. Poth: No objection, your Honor.

The Court: This witness is excused.

(Witness excused.)

JACK V. CORDRAY

the plaintiff, called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Poth): Will you state your name, please? A. Jack V. Cordray.

Q. And you are the plaintiff in this cause?

A. Yes, sir.

Q. Where do you live, sir?

A. 4202 Sunnyside, Seattle.

Q. And what is your occupation?

A. Longshoreman.

Q. And how old are you? When were you born?

(Testimony of Jack V. Cordray.)

A. I was born the 4th of May, 1920.

Q. And are you married? A. Yes.

Q. And how long have you been married?

A. Since 1941.

Q. Do you have any children?

A. I have two children alive and two dead.

Q. What is your—what are your types of duties as a longshoreman in so far as you're personally concerned?

A. My duties as a longshoreman?

Q. Yes. [322]

A. Most of my duties are driving bull on the dock and in the hold of ships.

Q. And how long have you been a bull driver?

A. Since—I believe it was the end of 1950 after my back operation.

Q. You mentioned a back operation. How did you hurt your back at that time?

A. Well, I had injured it on the dock down at Alaska Steam.

Q. What happened?

A. Well, it was just a simple case. There was a flatcar parked between Pier 42 north and 42 south. On that flatcar there was some kind of a tractor or cat. It had blocks under each end of it nailed to the car to keep the thing when the car was in movement, I guess, so it wouldn't fall off. I took a crowbar and I was taking a swipe at one of those blocks to knock it out of there, which we were supposed to do. I missed the block, and that was just the extent of it.

(Testimony of Jack V. Cordray.)

Q. And what happened then?

A. They took me to the hospital.

Q. And how long were you in the hospital?

A. Well, excuse me just a minute and I can tell you exactly. (Witness refers to paper.) I was hurt April the 11th, 1949, and I was in the hospital on the 11th and I was out April the 20th. [323]

Q. And how many days was that?

A. From April the 11th, 1949, to April 20th, 1949.

Q. Roughly nine days? A. Yes, sir.

Q. Were you operated on at that time?

A. No.

Q. When were you operated on?

A. I wasn't operated on until sometime—I can't give you the exact date, but it was in March of 1950.

Q. That was approximately a year later?

A. Approximately.

Q. And what treatment, if any, did you have during that year?

A. After I had my back operation?

Q. No, before you had the back operation.

A. Well, I was hurt April the 11th. April the 20th I was out. They put me back in May the 1st. I was out May the 9th. I went back to work May 16th, 1949.

Q. And did you work that year?

A. I tried to, yes.

Q. And did you work fairly steadily before you were operated on?

(Testimony of Jack V. Cordray.)

A. Before I was operated on, yes. Not after I was hurt, not between April the 11th, no, sir. My wife had to tie my shoes so I could go to work. I couldn't bend over. [324]

Mr. Howard: I move to strike the last part of the answer as not responsive.

The Court: It is stricken and the jury will disregard it.

The Witness: I'm sorry, sir.

Q. (By Mr. Poth): But you did try to work?

A. Yes.

Q. Then after you were operated on how long were you off?

A. I was operated on, like I say—I believe it was either the end of February or the first of March. I was off April, May, June and July.

The Court: Of what year?

A. Of 1950.

Q. (By Mr. Poth): And this was all in the low back? A. Yes, sir.

Q. When did you return to work, you say, approximately what date?

A. Well, it was in July. I would say approximately the middle of July of 1950.

Q. And did you work fairly steadily after that?

A. Yes, I did.

Q. What were you doing? What job did you have on the 14th and 15th of July, 1956?

A. On the 14th I was sent down from Pier 28 to help Mr. Copeland down at Pier 48. I had finished a ship at 28 [325] early and they sent me

(Testimony of Jack V. Cordray.)

down to help Mr. Copeland at 48 on another ship.

Q. And who was your employer?

A. Olympic Steamship.

Q. And what ship were you working in connection with? A. P & T Adventurer.

Q. And what were your duties there that night?

A. My duties were to see that the cargo was moving from the ship to the dock or from the dock to the ship, see that the cars were under the gear so the gear wouldn't be hanging at any time.

Q. Now, aside from cargo that went into cars, what sort of work was being performed there by you?

A. Well, we had cargo coming from some hatches, general cargo to the dock, some cargo was going in cars.

Q. All right. But now the general cargo that was coming off the ship, particularly in relation to the number two hatch of the ship, cargo that wasn't destined to go into a railway car, what did you do in connection with that cargo?

A. We had the bull drivers bring that in the dock and stockpile it.

Q. Would you explain how you stockpile it?

A. Well, as they bring loads off the ship you try to get the ship foreman to get the men in the hold to build the loads [326] level so when they are brought on the dock you can stack one load on top of the other so it doesn't take up so much space on the dock.

Q. And how are these loads stacked one on top of the other on the dock?

(Testimony of Jack V. Cordray.)

A. With the bull driver.

Q. And how high can they stack these loads?

A. Some of those loads you can go as high as thirty feet high.

Q. The bull will put them up that high?

A. I would say that, some bulls. Some machines are higher than others.

Q. Now, on this particular night where did the bulls get these loads that were piled up in the dock?

A. From the hook's gear, the ship's gear on the dock.

Q. And how did it get to the ship's gear?

A. It was sent out with the ship's rigging.

The Court: Where, if you know, did the longshoremen quit working with it?

A. I beg your pardon, sir?

The Court: With respect to that which was put inside the dock in piles which you just last described, when, at what point in that work did the longshoremen cease working with it?

A. Well, after we piled it on the dock on the [327] day shift you still have longshoremen come that take it down and sort it on the dock.

The Court: You may inquire.

Q. (By Mr. Poth): Now, did you have occasion to go aboard the defendant's vessel, the P & T Adventurer, on the morning of the 15th of July, 1956?

A. I'd been on the ship during the night of the 14th and the morning of the 15th.

Q. What were your occasions for going aboard?

(Testimony of Jack V. Cordray.)

A. The first time we went aboard the ship I went aboard the ship with the dock supervisor. His name is Mr. Wallace. There was cargo coming out of number four hold or number five, I'm not positive which one, and there were cars—it was stuff going into cars, gondolas. The stuff that was supposed to come out first was in such a position, I guess, that they couldn't get it out first, so the supercargo asked Mr. Wallace and I to come up and look down the hatch and see why they had to have a different car under the dock—under the hook. We had to go up there because we had to shift these other cars to get in the car that was supposed to be for that certain cargo.

Q. Then did you have occasion to go aboard after that?

A. Well, if I'm not mistaken we had went up, Mr. Wallace and I had went up twice with the supercargo. The supercargo had told me before midnight that some of these [328] gangs were going to work till after five o'clock in the morning.

Q. All right. Now, is it a custom and practice to go aboard ships on the part of dock foremen?

A. All the jobs that I've been on I've seen it, it has been a practice.

* * * * *

Q. (By Mr. Poth): What is the necessity, if any, of a dock foreman going aboard in regard to discharging operations of a ship?

A. Well, there's quite a few of them. Some of them, you go up there, you're bringing out differ-

(Testimony of Jack V. Cordray.)

ent kind of cargo. You want to find out what they are going to bring out next so that you can have the gear ready on the dock. If they are bringing out general cargo on boards, you have boards under the hook. Maybe they'll say, "In a little while maybe you're going to get tires." If they bring out tires they do not bring them out on boards, you have to have a different kind of equipment for your bull driver [329] to haul the tires away, and you get your information there.

Q. What other examples?

A. Well, I've had to go up there and ask the foreman, like that night when I went up I asked him, I said, "Is this gang going to go home or are they moving to another hatch?" Mr. Peters says, "Somebody, I don't know who, has changed their mind."

Q. What time did you go aboard?

A. The last time?

Q. The last time.

A. Well, it was approximately a quarter to five.

Q. I didn't quite catch that.

A. Approximately a quarter to five.

Q. And what was your purpose in going aboard?

A. The reason I went up, I went up on the gangplank, I seen Mr. Peters standing by number two. I went up to ask Mr. Peters if this gang was going to go home or shift to another hatch, and I had to have that information so I could let the drivers on the dock go or keep them.

Q. Now, as far as that gang aboard the ship

(Testimony of Jack V. Cordray.)

was concerned, if you had let your bull drivers go without consulting Mr. Peters would the ship gangs have been able to continue work? A. No.

Q. Why?

A. Because you have to have the drivers to give them the cargo or the dunnage or whatever they need.

Q. Well, now, where did you go when you went aboard ship about a quarter to five?

A. Right to number two hatch.

Q. And who did you see there?

A. Mr. Peters.

Q. And what did you say to him, if anything?

A. I asked Mr. Peters what they were going to do with that gang, whether they were going to send them home or move them to another hatch.

The Court: This is about three times. Do not ask him a question that calls for that answer again. I think we have heard that twice or three times now.

Mr. Poth: All right. Thank you, your Honor.

Q. (By Mr. Poth): And then what happened, if anything?

A. After I finished talking to Mr. Peters I turned around and I started to walk. Somebody hollered. The next thing I knew I was hit.

Q. Then what did you do and what happened to you, if anything?

A. Well, some stevedore, I don't remember which one it was, walked me off the gangplank and put me out on the dock. Somebody else called for

(Testimony of Jack V. Cordray.)

Mr. Copeland and Mr. Copeland [331] took me in the office to take me to the hospital.

Q. And did you go to the hospital? A. Yes.

Q. And how long did you stay in the hospital?

A. I went in the 15th and came out the 17th.

Q. How did you feel before you went to the hospital there that night after you had been hit?

A. Well, I was pretty rumdum. I really didn't remember too much. My chest was bothering me, the back of my neck was bothering me and my right front forehead was bothering me.

Q. And how did you feel when you were in the hospital?

A. Well, they had given me shots and ice packs. I still had the headaches when I was laying in the hospital.

Q. Then how did you feel when you got out?

A. I went home right after I was out of the hospital. The doctor told me to go home and rest. I went home, I laid down in bed, I felt terrible and my wife called the doctor.

Q. And then how long did you continue to feel terrible? A. Right up till today.

Q. Well, then did you go back to the hospital again?

A. I went back to the hospital, yes, August the 28th.

Q. And what did they do for you at that time, if anything?

A. They kept me in the hospital. They gave me shots, [332] tractions, and I believe every day

(Testimony of Jack V. Cordray.)

they took me downstairs to this physical therapy for heat treatments, massage and neck stretching.

Q. And how long were you in the hospital that second time?

A. I went in Providence Hospital August the 28th, came out September the 15th.

Q. And when did you go back to work?

A. Excuse me, I'll give you the exact date on that, too. (Witness refers to notebook.) I worked July the 24th and July the 28th.

Mr. Howard: I beg your pardon, that last date?

A. In July I worked July the 24th and July the 28th.

Q. (By Mr. Poth): Then after you got out of the hospital when did you go back to work?

A. Out of the hospital, excuse me. August, September,—October 22nd.

Q. Now, how did you feel when you went back to work?

A. Well, I didn't feel too good. The doctor had relieved some of the pain in my neck, I mean he gave me a little more motion, but I still had the pain in the right side of my neck and I was still getting these terrific headaches.

Q. Well, why did you go back to work if you were in that condition? [333]

A. Well, I'm sorry, sir, but I have a wife and two children that I have to feed. My wife can't work.

Q. Now, what treatment, if any, did you have after you got out of the hospital the second time?

(Testimony of Jack V. Cordray.)

A. The second time?

Q. Yes.

A. Well, I took physical therapy treatments at the Providence Hospital from September till January the 1st.

Q. And what did those physiotherapy treatments consist of? What did they do when they treated you?

A. I had the same treatments I had in the hospital. They gave me some kind of electrical treatments, neck massage and tractions.

Q. And then what did you do?

A. After——

Q. In the way of treatment.

A. Well, I had a few treatments at the doctor's office. I explained to the doctor that I had to work a little bit, so he had me buy a traction that I could set up at home that my wife could work for me.

Mr. Poth: Mark this for identification, just this one.

The Clerk: Plaintiff's Exhibit No. 5.

(A neck traction device was marked Plaintiff's Exhibit No. 5 for identification.) [334]

Mr. Poth: I might say, your Honor, that we will wish to present an order to withdraw these two exhibits at the earliest possible time.

Q. (By Mr. Poth): Now showing you what has been marked for identification as Plaintiff's Exhibit 5, I'll ask you to tell us what it is.

A. It's a neck traction.

Q. And how often do you use that?

(Testimony of Jack V. Cordray.)

A. Approximately every other day, sometimes more.

Mr. Poth: I wish to offer that in evidence at this time, your Honor.

Mr. Howard: No objection.

The Court: Admitted.

(Plaintiff's Exhibit No. 5 for identification was admitted in evidence.)

Q. (By Mr. Poth): Will you state whether or not that has been washed recently?

A. Yes, my wife washed it Sunday.

Q. Now I wonder if you could place it on for us and show us how it fits.

A. It's pretty hard to get on by yourself.

Q. Just place the canvas part on yourself in the position that you use it.

(Witness does as requested.)

A. The strap on the other side comes over here and hooks. [335] I can't hook it by myself.

Q. All right. Then what fastens on the top? Now you can take the mask off. Now hold up the other part.

(Witness does as requested.)

Q. All right. Now, that cord on there, how do you use that? How is that used?

A. Well, when we first put it up we had a pulley up, but the pulley wouldn't hold it. Now we throw it over the door, I get 'way up on my——

Q. What do you throw over the door?

A. The cord, excuse me.

Q. All right.

(Testimony of Jack V. Cordray.)

A. I throw the cord over the door and I get 'way up on my tiptoes as high as I can get, my wife stands in the back and holds against this with all of her weight and I go down real slow as far as I can. We do that six, seven, eight, ten times.

The Court: What do you call the entire thing after you have it assembled on your body in the manner you have just described?

A. I believe it's called a traction, your Honor. I'm not sure.

The Court: Traction gear, do you believe that is what you would call it?

A. I believe so, sir. [336]

Q. (By Mr. Poth): And why do you use that as frequently as you do?

A. Because I have to work and it does help to relieve the pressure and the headaches at the back of my neck.

The Clerk: Plaintiff's Exhibit No. 6.

(A neck brace was marked Plaintiff's Exhibit No. 6 for identification.)

Q. (By Mr. Poth): Showing you what has been marked as Plaintiff's Exhibit No. 6, I'll ask you to tell us what that is.

A. It's my neck brace.

Q. And how did you happen to get that?

A. Because it helps to relieve the pain in the back of my neck when I put this on, which I wear to work sometimes, sometimes when I drive, to keep my neck from falling forward. It helps so I don't have too much pain in the back of my neck.

(Testimony of Jack V. Cordray.)

Q. Now would you put that on for us?

(Witness does as requested.)

Q. All right, that's fine. You may remove it now. Who prescribed that for you?

A. Dr. Gray.

Q. And how long have you had it?

A. (Referring to notebook) August the 21st.

Q. Do you remember how much that cost you, Plaintiff's [337] Exhibit 6? A. This?

Q. Yes. A. No, sir, I don't.

Q. Do you remember how much the traction gear cost you?

A. No. My wife bought them. I really don't remember.

Q. Now, since you've been back to work how have you been getting along? That is, as far as pain and trouble with your neck is concerned, if any.

A. I have pain continuously in the right side of my neck. If I work steady on these rough docks and the rough holds of the ships I get these tremendous headaches and stiff necks. On many jobs I've had to quit because I can't stand it, and I'm not putting in today the hours I should be putting in.

Q. Now, how many hours did you work in 1955, the year before the injury? A. In 1955?

Q. Yes.

A. (Referring to paper) 1,881 and three-quarters.

Q. How many hours did you work in 1956?

(Testimony of Jack V. Cordray.)

Mr. Howard: May the record show that the witness is referring now and has been referring previously as to dates to some records that he carries in his pocket?

The Witness: This is from the employers. I'm [338] trying to tell the truth and that's the best I can do. In 1956 my longshore hours were 1,299 and three-quarter hours.

Q. (By Mr. Poth): And bossing hours?

A. 260 and one-quarter hours.

Q. And this year what are your total hours?

A. Up till the end of November——

Q. No,——

A. Or, excuse me, up till the end of October, 1957, I have 1,220 and one-quarter hours and 94 and three-quarter hours. About 1,314 hours or 1,315 hours, right up till the end of October, my last payday.

Q. How much did you make in 1955 altogether?

A. \$5,445.38.

Q. How much did you make in 1956?

A. My earnings in 1956 were \$5,160.06.

Q. How much have you made so far in 1957?

A. '57?

Q. Yes.

A. My longshore earnings are \$4,471.41.

Q. Your bossing earnings? A. \$401.27.

Q. In the year 1956 and in '57 here—excuse me, strike that. How are you employed? In which way are you selected for this longshore work? Are

(Testimony of Jack V. Cordray.)

you personally [339] selected or is it by a rotation system? A. A rotation system.

Q. What have been the job opportunities in the years 1956 and '57 in relation to job opportunities in preceding years?

A. Well, in 1956 according to the employers and everybody else was the biggest year they ever had on the Seattle waterfront.

Q. Are you acquainted with a Paul Anderson?

A. Yes, sir.

Q. And how do you know him?

A. He and I worked together on just about every job.

Q. Is he likewise a bull driver?

A. Yes, sir.

Q. And does he work as a foreman from time to time?

A. He's had a few jobs like myself, yes, sir.

Q. And do you know what he made in 1956?

A. Seven thousand eight hundred and some dollars, almost seventy-nine hundred.

Q. And did he have any other earnings besides that? A. No, sir.

Q. And do you know what he has made so far this year?

A. I talked to him Sunday. He's home with the flu right now and I talked to him Sunday and he has over seventy-three hundred made right up to date. [340]

Mr. Howard: Seventy-three hundred and eight?

(Testimony of Jack V. Cordray.)

A. I say up—no, I mean a little over seventy-three hundred.

Mr. Howard: Thank you.

Q. (By Mr. Poth): Made to date?

A. Yes. That was up till last Sunday when I talked to him.

Q. Where is he now?

A. He's home in bed with the flu.

Q. Have there been any raises in pay over the years? A. Yes, sir.

Q. And has that gone along with inflation?

A. Yes, it has.

Q. Generally how has inflation affected the income since 1950 of the average waterfront worker?

A. Since 1950?

Q. Yes. A. In 1951 I made \$5,887.67.

Mr. Howard: Excuse me. I would like to get these figures down, Mr. Cordray. A. Yes, sir.

Mr. Howard: If you would read it again I'll try and copy them. A. \$5,887.67.

Mr. Howard: Thank you.

Q. (By Mr. Poth): And what has been the inflationary increase [341] in wages, if any?

A. I can't tell you exactly. The wages are 'way up. If I'd have put in the hours in 1956 that I put in in 1955 I would be well over seventy-five hundred for 1956. [342]

* * * * *

Q. (By Mr. Poth): What percentage increase in the hourly rate of pay has there been since 1950, if you know? A. Since 1950?

(Testimony of Jack V. Cordray.)

Q. Yes.

A. Well, now, I'm not real sure on that, but I would say somewheres in the vicinity of fifty cents, sixty cents, an hour. Maybe more, maybe less, I can't say exactly.

Q. You would say roughly fifty cents an hour increase?

A. Yes, I would say roughly fifty cents an hour.

Q. Now, in 1956 did you earn a vacation?

A. I would not have if it hadn't have been for the foreman.

Q. Now, how do you feel right now? What's bothering you right now?

A. I'll tell you the truth. The way I feel right this minute I wish I could lay down.

Q. Yes, but I mean tell us what——

A. I'm sick right now. I have these continuous pains. Sitting in these chairs for two hours just don't work. I'm sorry. I have these continuous pains in the right side of my neck.

Q. What about your arm, if anything?

A. These two fingers, I have had this—it's been coming [343] down from the pinching in my back, it's came in and affected these two fingers. They feel like they're asleep.

Q. Do you have any pain in your arm?

A. No tremendous pain. It's just when this thing catches in my neck it sends some kind of a shot down there. That's the only way I can explain it, and it puts these fingers to sleep.

(Testimony of Jack V. Cordray.)

Q. Have you been free of pain in your neck since this injury? A. No, sir.

Q. What were you able to do for recreation, if anything, which you haven't been able to do since this accident?

A. Well, in 1953 up until 1956 I have managed Little League baseball and Little League football. This year I could not do it. I've lost out. I have put in some time with Little League, yes, but I cannot actually show these kids, and that is my biggest recreation, is for these kids from eight to eleven years old. That's my main hobbies.

Q. Did you used to get in and pitch ball with them? A. Yes, sir.

Q. Have you been able to do that since the injury? A. No, sir.

Q. Were you able to show them how to take out an end or [344] take out a tackle before?

A. I couldn't even take football this year. I got my certificate, and that's as far as it went. I go down and watch the kids. I can tell them something, but I cannot get down and show them.

Q. Were you able to demonstrate blocks and tackles to them before you got this neck injury?

A. Yes, sir.

Q. Well, how do you get along with your work?

A. I don't get along too good with my work at all.

Q. What trouble do you have?

A. I can't work steady. The doctor explained that to myself and to my wife. If I work six, seven

(Testimony of Jack V. Cordray.)

days in a row I'm hurting nobody but myself, but I have done it because I've had to. I've had certain bills come in. I'll work six, seven or eight days, then I'm off three or four days, five days. I can't stand that continuous jar on these machines on the dock or in the hold of the ship.

Q. When you're working do you experience pain? A. Yes.

Q. And what sort of pain do you experience?

A. Well, on my job when I'm driving these machines, what you call fork trucks, you have your loads in front of you. You can't drive forward, you have to turn around in the machine and drive backwards or else you'll run [345] over everybody on the dock. After I get around so far I have to turn my whole body to get around. Lots of times I can take that just so long. I'll quit and I'll have to go home and get somebody else to take my job and I'll go home.

Q. Has your neck and head been getting any better lately?

A. I've had better motion in my neck, but it's not any better as far as the actual pain is concerned when I overdo it.

Mr. Poth: I believe I have no further questions at this time.

The Court: You may inquire.

Cross Examination

Q. (By Mr. Howard): Mr. Cordray, you used the terms "lift truck" and "lift truck driver" and

(Testimony of Jack V. Cordray.)

“bull” and “bull truck” or “bull truck driver”. Is there any difference between the two?

A. No, sir.

Q. They are the same? A. Yes.

Q. You have referred to the supercargo in your testimony. Who was the supercargo, do you know?

A. I know his name now. At the time all I knew him by was Jumbo. I understand his name is Allinson. [346]

Q. Who was he employed by, do you know?

A. Honestly, I don't know who employs the supercargoes. I don't know who does that.

Q. What activity did he engage in in connection with the loading and discharging of cargo?

A. When you first go to work you ask the supercargo what hatches you're going to work, and that's about it, and you place your men accordingly. At the end of the day when the shift is over he will sometimes tell you who the gangs are coming back, and he signs the logs.

Q. Had you worked on this ship any previous day before this accident?

A. The P & T Adventurer?

Q. Yes.

A. I started that job the night of the 13th sometime before midnight. I can't give you the exact time.

Q. And that was working in what capacity?

A. As foreman with Mr. Copeland.

Q. Dock foreman? A. Yes.

Q. Who was doing the stevedoring work at that

(Testimony of Jack V. Cordray.)

time? A. Seattle Stevedoring.

Q. Now, Mr. Cordray, did you have any responsibility whatsoever in so far as your job as foreman was concerned in the physical operation of taking the cargo out of [347] the hold of the ship and landing it on the dock?

A. You mean by telling the stevedores in the hold how to do it?

Q. Yes. A. No.

Q. Did you have any responsibility in connection with the rigging, trimming or operation of the cargo-handling gear being used by the stevedores or longshoremen aboard the ship? A. No.

Q. Incidentally, is there any difference in your thinking between the word "stevedore" and the term "longshoreman"?

A. No, a longshoreman is a longshoreman.

Q. Is it the same?

A. Yes, sir, it's the same thing.

Q. The same as a stevedore?

A. It's all the same. You're considered longshoremen.

Q. All the same, did you have anything to do with the direction, or working as foreman did you have anything to do in connection with the winging in or swinging in of the booms of the ship when they completed their operations? A. No, sir.

Q. Who did all that work?

A. The stevedore—well, the longshore gang.

Q. Employed by whom? [348]

A. Seattle Stevedore.

(Testimony of Jack V. Cordray.)

Q. And you were employed by whom?

A. Olympic Steamship.

Q. Do you take orders from the dock supervisor?
A. Sometimes.

Q. As a matter of fact, he is the senior representative of the Olympic Steamship Company on the terminal during the night, is he not?

A. The dock supervisor has all the cars, the places on the dock marked out for cargo. He tells me what cars to put under what hatch.

Q. That was Mr. Wallace?
A. Yes.

Q. Did he give you any orders or directions on this particular night?

A. As far as the car work, yes.

Q. So you were working under his supervision?

A. Not necessarily, no. We were working together.

Q. How long were you aboard the ship before this accident occurred in terms of minutes or hours or——

A. It couldn't have been much over two or three minutes.

Q. Are you familiar with the office that's maintained on the dock?
A. Yes. [349]

Q. Who uses that office?

A. The dock foreman, checkers, sometimes the supercargoes.

Q. Sometimes the stevedore foremen?

A. Yes.

Q. What do they use it for?

(Testimony of Jack V. Cordray.)

A. Well, sometimes they go up there to make out their time.

Q. Some kind of a meeting place, is it?

A. I guess you could call it that.

Q. Now, Mr. Cordray, who was it that first treated you when you went to the hospital after this accident on the morning of July 15th?

A. Dr. Darrell Leavitt.

Q. And is that the same doctor that had treated you at the time of your 1949 accident and your operation in 1950? A. Yes, sir.

Q. Was he then your personal physician?

A. No, sir.

Q. Did you call him yourself? A. Yes, sir.

Q. You selected who was to be called?

A. There is a list of doctors that you have to call if you are hurt aboard the ship, and I know his name is on that list, I've read it many times, and that was the reason I went to him, because you have to go to one of those insurance doctors when your name is on that ship, or on the list. [350]

Q. You selected the doctor, didn't you?

A. Pardon?

Q. You selected the doctor, didn't you?

A. Yes, sir.

Q. Now, Mr. Cordray, you described an operation that was performed on your lower back in 1950 by Dr. Leavitt. A. Yes, sir.

Q. After the accident at Alaska Steam in 1949. I'll ask you whether or not you had any disability

(Testimony of Jack V. Cordray.)

or any trouble after you recovered from that operation?

A. I did have a disability from the State.

Q. Did that operation affect your ability to perform work as a longshoreman after 1950.

A. No, I don't believe so. Very slightly, if any.

Q. You don't believe it did?

A. I haven't missed very much work on account of my back because I transferred jobs and went on to be a bull driver or a lift driver.

Q. Now, I want to be sure that we understand each other, Mr. Cordray. I'm referring to the period from 1950 up to the time of your accident on the P & T Adventurer in 1956, and I'll ask you again, do you believe that that operation in 1950 after the accident in 1949 affected your ability to perform work as a longshoreman? [351]

A. Slightly, I say. In 1951 was the highest wages I've ever had, and that was a year after my operation.

Q. Did your back give you any trouble after that operation?

A. I've had minor trouble, yes, sir.

Q. Did it continue up to 1956?

A. Well, I get pains once in a while in the small of my back, yes.

Q. As a matter of fact, that's the reason you started working as a lift truck driver instead of doing a longshoreman's work, was it not?

A. Because I couldn't do heavy lifting.

Q. That's right. That's the reason you did it, is it not?

A. Part of it, yes.

(Testimony of Jack V. Cordray.)

Q. As the result of the 1949 accident?

A. Uh-huh.

Q. And as of the time of your accident in July of 1956 your principal work was that of a fork lift truck operator or a bull truck operator?

A. Yes, sir.

Q. And occasionally as a foreman?

A. Yes, sir.

Q. Extra foreman? A. Yes.

Q. And since this accident in 1956 and when you have been able to return to work your work has been primarily that [352] of a lift truck driver and an extra foreman? A. Yes, sir.

Q. Have you tried to go back to work as a longshoreman?

A. What do you mean, as a longshoreman? A longshoreman and a lift driver, it's all the same thing.

Q. Well, some longshoremen are assigned regularly to work as a lift truck driver, are they not?

A. Yes.

Q. And you are one of them, are you not?

A. Yes.

Q. Now, what I'm asking you, Mr. Cordray, is, did you go back to the regular work of a longshoreman?

A. I tried it a couple of times, if that's what you mean.

Q. You were unable to do it? A. Yes, sir.

Q. And you were unable to do that work before your accident of 1956, isn't that true?

(Testimony of Jack V. Cordray.)

A. After my—after 1956?

Q. After your operation in 1950 and before your accident in 1956 you were unable to do the work of a regular longshoreman?

A. I did have a few jobs in the hold of a ship.

Q. But mostly you were working as a lift truck driver?

A. Yes, sir.

Q. Now, Mr. Cordray, your earnings in 1951, which was the [353] year following your operation on your low back, were \$5,887.67?

A. Yes, sir.

Q. Do you know how many hours you worked in 1951?

A. 1,902.

Q. 1,902 hours. Now, what were your earnings in 1952, Mr. Cordray?

A. In 1952 my earnings were \$5,204.45.

Q. And how many hours?

A. 1,676 and three quarters.

Q. You worked 225 hours less in 1952 than you did in 1951?

A. Approximately, yes.

Q. And incidentally, these earnings that you're giving us are all for work as a longshoreman, lift truck driver or an extra foreman?

A. Yes, sir.

Q. Your total income for work as what you—

A. Back in 1950, sir, up until '55 I had no foreman jobs.

Q. I see. Now, how about 1953. how much did you earn?

A. \$5,733.97.

Q. And how many hours?

A. 1,684.

Q. And how about 1954?

A. \$5,115.38.

Q. And how many hours? [354]

A. 1,615.

(Testimony of Jack V. Cordray.)

Q. So in 1952 and 1953 and 1954 you were working in the 1,600 hour range, isn't that correct?

A. Yes, sir.

Q. And you were earning between \$5,115 and \$5,733?

A. Yes, sir.

Q. In 1955 your earnings again were how much?

A. In '55, sir?

Q. Yes. A. \$5,845.38.

Q. And how many hours?

A. 1,881 and three-quarters.

Q. And in 1956 again? This was the year of the accident.

A. My hours were 1,560 hours.

Q. 1,560? A. Yes, sir.

Q. And your total earnings?

A. My earnings for '56 were \$5,160.06.

Q. \$5,160?

A. Yes, sir. That's not counting the vacation check.

Q. And how much was your vacation time?

A. Well, in that year we had — I collected \$284.40, and I had collected \$48.83 as back pay.

Q. For back pay? A. Yes, sir. [355]

Q. That was all received by you in 1956?

A. Yes, sir.

Q. Reported as income in 1956?

A. Yes, sir.

Q. For income tax purposes?

A. Yes, sir.

Q. That would make a total in 1956 of \$5,492, is that right?

A. I've got here \$5,493.

(Testimony of Jack V. Cordray.)

Q. I may be off a dollar. I didn't take the odd dollars. You just gave me the——

A. Yes, sir.

Q. You didn't give me the cents.

A. Excuse me.

Q. Now, in 1957 to date again how much have you earned up to the end of October?

A. In '57?

Q. In 1957.

A. Counting — my longshore earnings are \$4,-471.41.

Q. Do you have some other earnings besides that? A. \$401.27 as foreman.

Q. 441.27? A. 401.

Q. I beg your pardon. Yes? A. That's it.

Q. That makes a total of \$4,872.68? [356]

A. Yes, sir.

Q. \$4,872.68 for nine months of 1957?

A. Right up to date.

Q. That would make an average of \$541 and some odd cents per month?

A. Approximately.

Q. Have you figured out, incidentally, how much you earned per month over the five years before 1956, that would be 1951 through 1955?

A. No, sir. There's been too much trouble in there. I wouldn't even attempt to figure it.

Q. Have you figured out how much your average per month was in any one of those years?

A. I have never figured out my monthly salary.

(Testimony of Jack V. Cordray.)

Q. Or what it would average over that period of years? A. No.

Q. This neck brace that you have demonstrated to us this afternoon, do you wear that at all when you're working? A. The collar?

Q. Yes. A. Sometimes.

Q. Sometimes? A. Yes.

Q. On what kind of work are you able to wear the neck brace?

A. When I'm driving. [357]

Q. When you're driving a lift truck or a bull?

A. Yes, and on some foreman jobs I can wear it.

Q. Do you ever check with the supercargo or the stevedore foreman on the dock to see about coordinating your activities?

A. Well, that wasn't what I was told when I started to work.

Q. I didn't ask you that, Mr. Cordray.

A. No.

Q. I asked you if you ever did it. A. No.

Q. When did you last work as a lift truck operator before this trial?

A. November the 5th I worked a half a night.

Q. And when did you last work as a dock foreman?

A. (Referring to notebook) October the 18th.

Q. If your hours of work through the end of September of 1957 total 1,315, I believe you have testified that your hours of work——

A. In 1957?

Q. Yes. A. Yes.

(Testimony of Jack V. Cordray.)

Q. 1,315. Then if you worked the same average number of hours for October, November and December, the last three months of 1957, is it not a fact that you would have a total of approximately 1,578 hours? [358]

A. My hours right now are up till the end of October. All I have is November and maybe one or one and a half weeks in December. Our pay stops sometime in——

Q. I misstated myself. If your hours through October are 1,315, then by applying that same average for the last two months of the year, November and December, is it not a fact that you would have a total of 1,578 hours?

A. I cannot answer that question because right now there is no work on the waterfront. It is very, very slim.

Q. In other words, right now there's a lot of men that are looking for work, isn't that true?

A. Some of them. You get out on your rotation turn.

Q. So that things are not so good on the waterfront right now?

A. They have been, yes, up till now.

Q. But not right now?

A. I should have had my vacation hours in last July.

Q. Did I understand you to say that things were very slim on the waterfront now?

A. This month, November.

(Testimony of Jack V. Cordray.)

Q. And they are usually pretty slim in December, too, aren't they?

A. Not last year, no, sir.

Q. How many hours did you work last December?

A. (Referring to notebook) December of '56, [359] that is before—just a minute. I worked 40½ one week, 51½, and 10, 20, 21, 28, and 29 hours. Most of those are foreman hours, last December. That ended December 23rd when our payroll stops.

Q. Is that all the time you worked in December?

A. Yes, sir.

Q. That's about 121 hours?

A. Last December there was a lot of work.

Q. I beg your pardon?

A. December of last year there was a lot of work.

Q. That's about 30 hours a week in a four-week month, is it not, Mr. Cordray?

A. These figures that I gave you are three weeks.

Q. You didn't work any the last week?

A. Our new payroll started on December 24th.

Q. That's why I asked you if that's all the money you earned in December. A. Of '56.

Mr. Howard: That's all the questions I have.

The Court: Anything further?

Mr. Poth: Yes, I have some questions, your Honor.

The Court: You may inquire. [360]

(Testimony of Jack V. Cordray.)

Redirect Examination

Q. (By Mr. Poth): Now, Mr. Cordray, you've been on the waterfront you say since 1939, is that right? A. Yes, sir.

* * * * *

Q. (By Mr. Poth): What did your father do?

A. He was a longshoreman.

Q. And how long was he a longshoreman?

A. Well, he's retired now, and it was a good forty years before he retired. [361]

* * * * *

(Witness excused.) [362]

* * * * *

The Court: Plaintiff's Exhibit 6 is admitted.

* * * * *

Mr. Poth: Yes, your Honor, for the record I wish to state that as of now plaintiff rests.

The Court: You may now proceed.

Mr. Howard: At the close of plaintiff's evidence defendant hereby moves, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for dismissal of plaintiff's action on the ground that upon the [364] facts of record and upon the law applicable to said action plaintiff has shown no right to relief against the defendant Pope & Talbot, Inc.

Defendant additionally moves——

The Court: I wish to say to Counsel on both sides that I have read your briefs on this subject very carefully. I have noted the cases you have cited and tried to compare those cases as to facts

disclosed in your brief, as to each one of them, with the evidence as I have heard it in this case with respect to the nature of the employment about which this plaintiff has testified and other witnesses have testified the plaintiff was concerned in and working at the time of the accident. In view of such light as the Court has of the kind mentioned you may now proceed, Mr. Howard.

Mr. Howard: The defendant additionally moves at the close of plaintiff's evidence for a directed verdict against the plaintiff and in favor of the defendant upon the following specific grounds:

1. That all such evidence fails to show that plaintiff is entitled to relief from defendant on the ground of unseaworthiness.

2. That all such evidence fails to show that plaintiff is entitled to relief against defendant on the ground of negligence or negligent failure to [365] perform any duty owing from defendant to plaintiff.

3. That all such evidence fails to show any unseaworthiness of the vessel or negligence of the defendant on the basis of which plaintiff would be entitled to recover against defendant.

The defendant additionally moves at this time to withdraw from the consideration of the jury all issues as to the unseaworthiness of the vessel on the ground and for the reason that it is defendant's position that plaintiff has not shown that he is within the class of workers entitled to a warranty of seaworthiness from a shipowner.

Now, if the Court please, I will speak very briefly

about these motions because I do feel that they are very important to the defendant's case.

As to plaintiff's cause of action, he has amended it to insert both a cause of action based on negligence and one on unseaworthiness.

The Court: I notice that he has amended Paragraph No. VII of the original complaint. I do not see any corresponding amendment or proposal for amendment as to Paragraph No. VIII of the original complaint, and I ask you, is that a deficiency or not from the standpoint of either side.

Mr. Howard: So far as defendant's Counsel [366] know there has been no corresponding amendment of Paragraph VIII of the complaint.

The Court: I call that to the attention of Counsel on both sides for whatever consideration they may wish to give it. You may proceed.

Mr. Howard: Defendant submits that the doctrine of unseaworthiness does not extend to a dock foreman such as the plaintiff in this case. All of the evidence without exception and without contradiction in plaintiff's case is to the effect that the plaintiff had nothing whatsoever to do with the operation of discharging cargo from this ship to this dock. Further, that the plaintiff had nothing whatsoever to do with the supervision of longshoremen working on the ship. Also that the plaintiff had nothing whatsoever to do with the operation of winging in the ship's booms, which was the operation being performed at the time of the accident.

The evidence clearly shows on plaintiff's case that the plaintiff was aboard the ship for one pur-

pose, and that purpose was connected with his responsibilities on the dock, not on the ship, and that was the purpose of his visit aboard the ship. [367]

* * * * *

The Court: Mr. Howard, do you contend that there is no evidence up to this time before the Court and jury which tends to establish what appears to be the plaintiff's asserted allegation and contention that [370] the unloading of this cargo had not been completed until the work of the crew of longshoremen foremanned by the plaintiff had been performed and that plaintiff was injured at a time when he was acting as such foreman of a crew, although working on the dock, were doing so in that part of the unloading operations which was the completing part and still a part of the unloading of the cargo? Do you contend that there is no evidence sustaining that position?

Mr. Howard: We recognize, your Honor, that that is plaintiff's contention. We take the position that the discharging of the cargo terminated when that cargo was raised out of the hold of the vessel by the ship's gear and landed on the dock by the stevedores employed by the Seattle Stevedore Company, and that the termination occurred at that point. Thereafter the work was not strictly and truly longshoremen's work, it was dock work, and that under the *Sieracki* case the Supreme Court was talking in terms of men, longshoremen, working as longshoremen aboard a vessel, not on a dock.

The Court: Do you contend that there is no evidence, not any evidence to support the plain-

tiff's contention that the plaintiff was working in that part of the unloading work which was yet to be completed and in connection with which plaintiff and his crew of [371] longshoremen were doing the completing work? Do you contend there is no evidence to support that contention?

Mr. Howard: We admit that the evidence of the plaintiff is that the dock workers were going to move this cargo from the place that it was landed on the dock into the warehouse. We do not admit or we do not recognize that there is any issue as to that because it is our contention that the discharging operation from the vessel terminated when the cargo was landed on the dock.

The Court: In that connection do you argue or do you contend that this Court must find as a matter of law that on the evidence in the case up to now it was a part of the shipping contract to put this cargo at the places where plaintiff and his crew were engaged in putting it at the time of the accident and that that obligation on this carrier was a part of the carriage contract? Do you make any contention like that?

Mr. Howard: We have made no contention to that effect, your Honor. However, we don't deny that it is part of the obligation of the steamship company as carrier to not only raise the cargo out of the hold and land it on the dock, but also to place it in the warehouse.

The Court: Where these men foremanned by [372] the plaintiff were putting it or engaged in putting it at the time of the accident?

Mr. Howard: That's right, yes, your Honor.

The Court: I believe that will have to determine the Court's ruling upon this motion. [373]

* * * * *

The Court: On the question of negligence the Court is of the opinion and finds at this stage of the evidence that there is evidence which, if believed by the jury, would support a jury finding that the work being done by the plaintiff and his crew of workmen was a part of the cargo unloading operations of this vessel at the time and place in question, and that the relationship of plaintiff to that work was longshoreman's work and as such if a name or a status indicating relationship or non-relationship with the crew of the vessel was that of a seaman, according to the Supreme Court's view in the Sieracki case, no less than a regularly articulated member of the ship's navigating crew.

That being the case, the rule of comparative negligence applies in this case, and even though the plaintiff as well as the defendant may be thought or found by the jury to have been negligent, the Court is not prepared now to hold that plaintiff's action for negligence would thereby be defeated or that anything [387] more as a result would come from such a state of plaintiff's negligence than a reduction of a portion of plaintiff's recoverable damages. As to that I will hear Counsel further, and I now invite Counsel further to discuss it at the close of all the evidence in chief along with any other questions that Counsel on either

side may then wish to repeat or may with propriety renew.

The Court, on the issue of whether this plaintiff may maintain this action before this jury on the evidence up to now relating to unseaworthiness, rules that the plaintiff may do so, and the motion to withdraw the case from the jury and to dismiss the action in respect to the cause of action for unseaworthiness is denied.

The Court further denies a similar motion respecting the cause of action for negligence.

Mr. Howard: May exceptions be noted on the record to your Honor's rulings?

The Court: That will be done. The exceptions in so far as they are objections are overruled, but the exceptions will be noted. [388]

* * * * *

The Court: The plaintiff having rested plaintiff's case in chief and the defendant having made certain motions which have been presented to the Court and have been ruled upon by the Court with like effect as if each and all said motions were presented to the Court at this time, the defendant may now proceed with the defendant's case in chief.

Mr. Howard: Call Mr. Allinson. [389]

FRED G. ALLINSON

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Howard): Will you state your full

(Testimony of Fred G. Allinson.)

name and your address, sir?

A. Fred G. Allinson, 6415 Beacon Avenue.

Q. Will you spell your last name?

A. Allinson, A-l-l-i-n-s-o-n.

The Court: And it is Fred G.?

A. Fred G.

The Court: You may inquire.

Q. (By Mr. Howard): What is your occupation, Mr. Allinson? A. Supercargo.

Q. And by whom are you employed?

A. Various companies.

Q. Included in those companies is Pope & Talbot, Inc.? A. That's right.

Q. How long have you been working as a supercargo?

A. Oh, as a supercargo I should say ten, eleven, twelve years.

Q. And what was your occupation before that?

A. Checker, supervisor.

Q. Was that on the waterfront?

A. On the waterfront. [390]

Q. And has all of that work been here at Seattle? A. That's right.

Q. Now will you describe briefly to us what your duties are as a supercargo?

A. Well, I'm in charge of the ship for loading or discharging.

Q. And when you're doing those duties you're working for who?

A. For the shipping company, or the agent.

Q. Were you employed as a supercargo by Pope

(Testimony of Fred G. Allinson.)

& Talbot, Inc., on July 14-15, 1956? A. Yes.

The Court: Will you further specify what you mean by the words "shipping company" with respect to the operation of the ship? Whom do you mean, if anyone?

A. Well, the operators, Pope & Talbot, for instance, they are the shipping company, I work for them.

The Court: With respect to the movement of a ship and the carriage of cargo what is the relationship of the concern you call the shipping company?

A. Well, it would be the owners, I suppose.

The Court: The owners of what?

A. The owners of the ship.

The Court: You may proceed.

Q. (By Mr. Howard): Were you employed by Pope & Talbot, Inc., as a supercargo on July 14th and 15th, 1956, in connection with the steamer P & T Adventurer? [391]

A. I was.

Q. And do you recall where that ship was located at the time? A. Pier 48.

Q. Here in Seattle? A. That's right.

Q. And what type of operations were being conducted on the ship during that period?

A. We were discharging cargo.

Q. Now, what hours would you work, what hours did you work during that period of time?

A. Well, from six in the evening till five in the morning, or six in the morning.

(Testimony of Fred G. Allinson.)

Q. And was there another supercargo that worked the day shift? A. That's right.

Q. When you are working as a supercargo where do you station yourself? Where are those duties performed?

A. Well, at no set place. Either on the ship—in the case at 48 we have an office in the middle of the dock.

Q. And what is that office used for?

A. Well, for making your reports out or for figuring out your cargo.

Q. Now, at that time, Mr. Allison, who was performing the operations of discharging the cargo from the vessel? [392]

A. The stevedoring company, do you mean?

Q. Yes.

A. That would be Seattle Stevedoring Company.

Q. And who was performing the operations on the dock after the cargo was discharged from the vessel?

A. Well, I guess that would be Olympic Steam or Seattle Handling; I don't know what they call it.

Q. Were you present and a witness to an accident involving Mr. Jack Cordray, the plaintiff in this case? A. No.

Q. Do you know Mr. Cordray? A. I do.

Q. And do you know in what capacity he was working on the night of July 14-15, 1956?

A. Yes.

Q. What capacity was that?

A. He was foreman on the dock.

(Testimony of Fred G. Allinson.)

Q. And as a foreman on a dock what were the nature of his duties?

A. Well, to took after the bull drivers and make sure that the cargo is cleared away from the hatch.

Q. Did those pertain to the cargo after it had been discharged from the ship?

A. Well, it has to be put on the dock, inside the dock.

Q. And did Mr. Cordray have anything to do with the [393] discharging of the cargo from the ship? A. No.

Q. Did Mr. Cordray as dock foreman have anything to do with the operation of the cargo-handling gear aboard the ship? A. No.

Q. Did Mr. Cordray have anything to do with the manipulation of the booms or the swinging in or winging in of the booms on completion of the cargo discharging operations? A. No.

Q. In other words, all of his duties were on the dock? A. Yes.

Q. Now, do you have occasion as supercargo to talk from time to time with the dock foreman?

A. Yes.

Q. And what is the necessity for that?

A. Oh, it takes in a pretty wide range there of different things. We talk about cargo or how many men he has working for him or how many he's going to get, or——

Q. And where would such conversations take place?

A. They're liable to take place any place.

(Testimony of Fred G. Allinson.)

Q. Would you have occasion to go out on the dock from time to time during the discharging operations? A. Oh, yes.

Q. Would you have occasion to talk with the dock foreman on the dock? [394] A. Yes.

Q. You have mentioned that there is a dock office. Is that used for the purpose of exchanging information and coordinating your operations?

A. Well, not necessarily, but it could be.

Q. Is it done that way sometimes?

A. It is done, yes.

Q. Now, do you recall having seen Mr. Cordray aboard the P & T Adventurer on the night of July 14th or the early morning of July 15th?

A. No, I'm not sure that I saw him then.

Q. Did you have any occasion to talk to Mr. Cordray aboard the ship? A. No.

Q. If there were any orders or information to be given to the dock foreman regarding the progress of the ship's work, who would normally give those instructions orally? * * * * * [395]

A. Well, I would normally, yes.

Q. (By Mr. Howard): Do you know who the stevedore foreman was on the night of July 14th?

A. Mr. Peters.

Q. And what was his responsibility or duty?

A. He was in charge of the longshoremen.

Q. And those are the men working where?

A. Well, on deck, the deck men and the stevedores in the hold.

Q. Did Mr. Cordray have any duty or respon-

(Testimony of Fred G. Allinson.)

sibility as far as supervision of those longshoremen are concerned? A. No.

Q. Did you see Mr. Cordray after the accident occurred? A. I didn't, no.

Q. Did you have any occasion to check the gear or ship's equipment that was involved in the accident after it occurred? A. No.

Q. When did you first learn of the accident, Mr. Allinson?

A. Oh, around an hour after it happened, I guess.

Q. And where were you located then?

A. In the saloon having coffee.

Q. Do you know what the cause of the accident was? A. No, I don't.

Mr. Howard: That's all the questions I have.

Cross Examination

Q. (By Mr. Poth): What time did you go to work on the night of the 14th?

A. Now, do you mean——

Q. The 14th of July, 1956.

A. Well, what day was that?

Q. Well, it was the day——

A. Well, what I mean is, we carry our time—we start at six in the evening and we carry that 14th right through till such time as we quit in the morning.

Q. I believe the 14th was a Saturday and the 15th was a Sunday.

(Testimony of Fred G. Allinson.)

A. The 15th was a Sunday? I think—Saturday was the 15th, I think.

Q. Saturday was the 14th. What time did you go to work on the 14th on the P & T Adventurer?

A. Well, that would be six oclock in the evening, if it was in Seattle. If I remember right I think I worked in Olympia on Saturday night on the P & T Adventurer.

Q. You worked in Olympia on the P & T Adventurer on Saturday night, the 14th?

A. I'm not sure on the dates because I haven't checked back on it.

Q. Well, now, was the ship in Olympia when you were sitting in the saloon having coffee an hour after the accident [397] when you heard about the accident to Mr. Cordray?

A. Was it in Olympia? No, it was in Seattle.

Q. Well, let's just refer to the night that Mr. Cordray got hurt.

A. Yeah, O.K.

Q. What time did you go to work?

A. Yes, the night that Mr. Cordray got hurt.

Q. Yes. What time did you go to work?

A. Six o'clock.

Q. And where was the ship?

A. Pier 48 in Seattle.

Q. Where did you first go at six o'clock?

A. To the office in the middle of the dock.

Q. And what did you do in the office?

A. I got lined up with the day supercargo, what was going on, what operations were going on.

(Testimony of Fred G. Allinson.)

Q. You talked to the day supercargo, is that right? A. Pardon.

Q. You talked to the day supercargo?

A. That's right.

Q. What's his name? A. Tretheway.

Q. What did you next do? What did you do after that?

A. Well, I got lined up, and generally the foreman comes in about that time, and—— [398]

Q. Generally the foreman comes in. I'm asking you what happened at this particular time.

A. Well, I couldn't tell. That's a year—that's fifteen months ago. I couldn't tell what happened.

Q. When did you first leave that office?

A. Well, I can't recall that either.

Q. Do you recall going aboard the ship that night?

A. Oh, yes, I was aboard the ship.

Q. What time did you first go aboard the ship?

A. Well, I couldn't tell that either.

Q. Do you recall anybody you saw aboard the ship?

A. Well, naturally I'd see everybody that was working on the ship, yes.

Q. Well, who do you recall the names of?

A. Well, I'd have to name some longshoremen. I don't know what gangs were working. I don't remember what gangs were working that night.

Q. Do you know the names of any of the officers or mates on the ship? A. No, I don't.

(Testimony of Fred G. Allinson.)

Q. Do you remember what any of them look like?

A. Well, yes, naturally I'd know. Maybe the chief mate, if he'd happen to be aboard, I'd know him.

Q. What did he look like?

A. Well, I couldn't tell you that. [399]

Q. Did you ever go uptown that night?

A. No.

Q. What did you do at midnight?

A. I ate my lunch in the office.

Q. Do you remember any place you went particularly on the ship that night?

A. Yes. I was on the deck and to every hatch. That's my duty, to watch the cargo to see how it's coming out.

Q. How many hatches were working that night?

A. I don't recall that. I'd have to look at my daily report, I'd have to look back.

Q. Well, you do remember being in the saloon and having coffee? A. That's right.

Q. Where were you at the time Mr. Cordray got hurt?

A. Well, I was either on the ship or on the dock. I don't know which.

Q. Were you in the saloon having coffee?

A. No.

Q. When did you get to the saloon and have coffee?

A. Well, I don't know just the exact time.

(Testimony of Fred G. Allinson.)

Q. You're mainly supposed to be on the ship when you're supercargo, aren't you?

A. Well, the main duties are on the ship, yes, to see to the dispatching of the cargo, yes. [400]

Q. And you don't spend your time in your office on the dock, is that right?

A. Not all the time, no. I'm in there——

Q. Once in a while?

A. Yes, once in a while, maybe.

Q. But mainly you're on the ship?

A. Mainly, yes.

Q. Now, were you on the ship at 4:45 a.m.?

A. No, I don't think I was.

Q. Where do you think you were?

A. I think I was up in the office, because that would be just about quitting time.

Q. What time did that ship quit?

A. I'd have to look at the daily report to check back.

Q. Isn't it a fact that she worked till eight o'clock that morning?

A. If that was the day it sailed for Olympia, yes.

Q. She worked till eight o'clock, the work didn't quit at five o'clock?

A. No, that's right. That's why I say, I'm not sure on the dates. I've never looked them back up.

Q. Well, on the day when Mr. Cordray got hurt and you heard about it an hour afterwards while you were drinking coffee in the saloon, on that par-

(Testimony of Fred G. Allinson.)

shoremen, or when the longshoremen left the ship.

Q. Referring to a particular load that comes out of the hold of the ship, when did the responsibility of the longshoremen employed by Seattle Stevedore Company, when did their work end on a particular load?

A. Well, I suppose it would end just as soon as the dock bull driver picked up the load and took it in the dock.

Q. I see, and who is that dock bull driver employed by? A. He's hired by the dock.

Q. Not by Olympic—not by Seattle Stevedore Company?

A. That's right, not by Seattle Stevedore Company.

Mr. Howard: That's all.

Recross Examination

Q. (By Mr. Poth): Have you ever worked for American Mail Line? A. Yes, I have.

Q. Does American Mail Line own ships, vessels?

A. Yes, I guess they do. [404]

Q. Now, at the American Mail Line dock—where is that? A. Pier 88.

Q. It's out at Smith Cove?

A. That's right.

* * * * *

Q. (By Mr. Poth): Referring to Seattle Stevedoring Company, have you ever worked for Seattle Stevedoring Company? A. Never have. [405]

* * * * *

(Witness excused.)

The Court: Next witness.

Mr. Howard: Mr. Robinson.

SETH W. ROBINSON

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

Mr. Howard: I would like to have before the witness Defendant's Identifications Nos. A-5 and A-6.

The Court: That will be done.

(The documents were placed before the witness.)

Direct Examination

Q. (By Mr. Howard): Will you state your name and your address, please? [406]

A. Seth W. Robinson. Route 2, Box 253, Alderwood Manor.

The Court: Will you pause for a moment. You asked for Defendant's Exhibits A-5 and A-6.

Mr. Howard: A-5 and A-6, not yet admitted.

Q. (By Mr. Howard): By whom are you employed, Mr. Robinson?

A. Waterfront Employers of Washington.

Q. Are you appearing here today in response to a subpoena duces tecum issued by this Court?

A. Yes, sir.

Q. Did you bring with you records concerning the employment and the earnings of Mr. Jack Cordray?

A. Yes, I did.

Q. Now, before you have been placed Defend-

(Testimony of Seth W. Robinson.)

ant's Identifications A-5 and A-6. I will ask you to compare those with the records which you have and then I would like to ask you some questions on them. Does the exhibit bearing date of March 1, 1957, correctly reflect the amounts received by Mr. Cordray through Waterfront Employers Association for work performed on the Seattle waterfront as a longshoreman, a dock worker or a dock foreman?

A. Yes, sir. That would also include all ports in the State of Washington excluding Vancouver.

The Court: Washington?

A. In the State of Washington, yes, sir. [407]

Q. (By Mr. Howard): Excluding Vancouver, Washington?

A. And the Columbia River area.

Q. Would you explain to the jury, please, the system for paying longshoremen? Are they paid directly by the company that they work for, or what is the arrangement?

A. We have two types of payrolls, one in which we handle all the records——

The Court: "We," who is "We"?

A. Waterfront Employers of Washington. The companies submit the time to us to consolidate and pay the man and take taxes and et cetera and report taxes at the end of the year.

The other type of payroll which we call non-consolidated payroll, the man is paid by the stevedoring company but we still maintain the records and taxes and report those at the end of the year.

(Testimony of Seth W. Robinson.)

Q. (By Mr. Howard): And are the amounts paid from both of those methods included in the figures which appear in the report under date of March 1, 1957? A. Yes, sir.

Q. And have you checked those now?

A. Yes.

Q. And are they correct as to the amounts for each of the years from 1951 through 1956?

A. Yes, they are. [408]

Q. And for the period up to February 25th of 1957? A. That is correct.

Q. Now referring to the other exhibit under date of October 4, 1957, I will ask you to check that with your records on Mr. Cordray as to earnings for each calendar month through September in 1957.

(Brief pause.)

Q. Have you done so? A. Yes.

Q. Will you state whether or not the amounts shown for each month during that period are correct? A. Yes, they are.

Q. And do those represent the total earnings received by Mr. Cordray for each of those months for service at any port in the State of Washington excluding Vancouver, Washington, for services as a longshoreman, a dock worker or a dock foreman?

A. That is conforming with our records of what we have recorded.

Q. That's what your records show?

A. Yes.

The Court: Will you state again the beginning

(Testimony of Seth W. Robinson.)

time and the ending time of the period of time covered by your last statement? Again what month, what year, and ending what month of what year?

A. Well, the first record showed total wages for——

The Court: No,——

A. Just for the month?

The Court: I want to know the time involved in these records, the earliest date and the latest date.

A. Well, our records go from 1951 that were——

The Court: What month, if you know?

A. That actually is December 26th of 1950, which we record in the year 1951.

The Court: And going down to what month as the latest month included in these records?

A. We go through the month of September.

The Court: What year?

A. 1957.

The Court: You may proceed.

Q. (By Mr. Howard): And is that for the complete month of September of 1957?

A. No, sir, that excludes the last four days, the Monday preceding the last——

Q. Have the records been completed yet for the calendar month of October of 1957?

A. They are in process now.

Q. In process? A. Yes, sir. [410]

Mr. Howard: I again offer in evidence Defendant's Exhibits A-5 and A-6.

The Court: Did Counsel hear? Let Mr. Poth have what he wishes, if it is available.

(Testimony of Seth W. Robinson.)

Mr. Poth: Thank you, your Honor.

The Court: Did Mr. Poth hear the offer?

Mr. Poth: Yes. I have no objection, your Honor.

The Court: Each of those exhibits mentioned by Mr. Howard is now admitted, namely, A-5 and A-6, each of them.

(Defendant's Exhibits Nos. A-5 and A-6 for identification were admitted in evidence.)

[See pages 457-458.]

Mr. Howard: I would like to have those passed to the jury.

The Court: That will be done.

(The exhibits were passed to the jury.) [411]

* * * * *

Mr. Howard: I have no further questions of this witness, your Honor.

The Court: You may cross examine.

Mr. Poth: May I have this marked for identification?

The Court: That will be done.

The Clerk: It will be marked Plaintiff's Exhibit No. 7.

(A letter dated October 14, 1957, re hours worked by Jack Cordray, was marked Plaintiff's Exhibit No. 7 for identification.)

The Court: Can you attach to it a name that you think will be agreeable to opposing Counsel?

Mr. Poth: Pardon?

The Court: Can you attach to this Plaintiff's Exhibit 7 for identification a name?

Mr. Poth: Yes.

(Testimony of Seth W. Robinson.)

The Court: Which you think would not be objectionable to opposing Counsel?

Mr. Poth: Record of hours.

The Court: Do you mean plaintiff's compiled earnings record?

Mr. Poth: Yes.

The Court: You may proceed. [412]

Cross Examination

Q. (By Mr. Poth): Showing you what has been marked for identification as Plaintiff's Exhibit 7, I'll ask you whether or not that is the Waterfront Employers' record of the hours of work performed by Jack Cordray? A. Yes, that is.

Q. It is? A. Yes.

Q. And for what years?

A. 1949 through September 30, 1957.

Mr. Poth: I'll offer that in evidence.

Mr. Howard: No objection.

The Court: Admitted.

(Plaintiff's Exhibit No. 7 for identification was admitted in evidence.)

[See page 451.]

Mr. Poth: And may that be passed to the jury, please?

The Court: That will be done.

Mr. Howard: May I interrogate the witness about the exhibit after—excuse me.

The Court: The Court's statement is now amended to admit that, after which it will be passed to the jury for their temporary inspection.

(Testimony of Seth W. Robinson.)

Mr. Howard: Before it is passed to the jury [413] I would like to ask a question or two.

The Court: That is what the Court is now providing. Have you finished interrogating this witness?

Mr. Poth: Yes, your Honor.

Redirect Examination

Q. (By Mr. Howard): Do you know what has been cut off the exhibit, Mr. Robinson?

A. It appears to be the earnings corresponding to the hours by year.

Mr. Poth: If I might say, your Honor, that is not any earnings. There was some comment written by my client which I cut off. I have it right here and Counsel may see it, the comment that he wrote on it. I'll give it to the Court——

The Court: Let Counsel see it, if you have no objection.

(Mr. Poth handed a paper to Mr. Howard.)

Mr. Poth: I didn't feel it was proper to have my client's comment on it.

The Court: That explanation is sufficient.

Mr. Howard: May I see the exhibit?

The Court: You may.

(Plaintiff's Exhibit No. 7 was handed to Mr. Howard.) [414]

* * * * *

The Court: The witness is excused. Do you wish to permanently excuse him? [415]

* * * * *

ALFRED L. ARVIDSON

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Howard): What is your address, Mr. Arvidson? [416]

A. 3715 34th Avenue Southwest, Seattle.

Q. What is your present occupation?

A. I'm the assistant district manager for the States Steamship Company, Seattle.

Q. And what was your occupation as of July 14-15, 1956?

A. District operating manager for Pope & Talbot, Incorporated.

Q. Does Pope & Talbot now have its offices here in Seattle? A. No.

Q. When were those discontinued?

A. I think the 1st of February, '57.

Q. How long had you been employed by Pope & Talbot?

A. Since July, 1926, till the first of February of '57.

Q. What different types of work were you doing during that period?

A. Oh, starting in as clerical work and then pretty much in the operating department, assisting in the operating department.

The Court: Did you say the beginning of that service with Pope & Talbot was in 1926?

A. 1926, yes.

(Testimony of Alfred L. Arvidson.)

The Court: You may inquire.

Q. (By Mr. Howard): Have you ever had any experience on ships as an officer or member of the crew?

A. No, sir. [417]

Q. All of your experience with Pope & Talbot has been as a shoreside employee?

A. Yes, sir.

Q. Now, were you present aboard the P & T Adventurer at the time of an accident on the early morning of July 15, 1956?

A. No, sir.

Q. Do you recall how you first learned of that accident?

A. Oh, my recollection, of course it could be wrong, it's a long time ago, but it seems to me that it was on a Monday morning the supercargo on the ship, at that time the ship was at Olympia, asked me if I had heard about an injury, an accident that had happened at Pier 48 before the ship had left for Olympia. It seems to me it was a Monday morning that he asked me about it, and it would be my recollection it might have been a Sunday morning that the ship had left Pier 48 for Olympia. That could be wrong, but I know there was a little time intervening, possibly a day.

Q. At that time, namely, on July 14-15, 1956, did Pope & Talbot, Inc. have any contract with any company with respect to the operations of loading or discharging cargo from its vessels at Seattle?

A. Yes. For the stevedoring of the vessel, that would be—that contract was with the Seattle Stevedoring Company. [418]

(Testimony of Alfred L. Arvidson.)

Q. And what did that contract cover? What was the extent of the operations covered by that contract?

A. Well, that was to stevedore, handle the cargo from in the ship's hold to the end of ship's tackle, or—and in loading cargo to take the cargo at tackle at the ship's sling and take it aboard and stow it away.

The Clerk: Defendant's Exhibit A-9.

(Correspondence re contract was marked Defendant's Exhibit No. A-9 for identification.)

* * * * *

The Court: Now wait just right there. What is your contention on that point? Do you agree up to this point about what the contractors and each of them agreed to do? Is that in accord with your understanding of this situation?

Mr. Howard: Well, your Honor, I agree that the admitted fact is that the Seattle Stevedoring Company had a contract with Pope & Talbot to load and discharge cargo from the vessel. I also agree that Pope & Talbot had arranged with Olympic Steamship Company as a public terminal operator to handle that cargo on the dock.

The Court: The public terminal operator?

Mr. Howard: As a public terminal operator.

The Court: Then I do not see how—whose invitation or contract started whichever one of these stevedores, contracting stevedores, to work on the dock and on the ship? Whose word was it that started one working on the ship and the other one working on the dock?

Mr. Howard: Pope & Talbot, your Honor.

Mr. Poth: Pope & Talbot, your Honor.

The Court: Pope & Talbot in both instances put out the word that put the two stevedoring concerns to work, is that right? [426]

Mr. Howard: I don't think there is any dispute about that in the evidence.

The Court: And you do not seek to show it was for any other purpose, it was for the purpose of discharging the steamship carrier's obligation to carry and deliver cargo to the consignee that these two things were done?

Mr. Howard: Yes. We haven't had testimony on that, but I expect this witness will give that testimony. [427] * * * * *

The Court: But it is now amended by the pre-trial order, all agree, to state what the true facts were with respect to what part of the work each contractor did?

Mr. Howard: That's correct, your Honor. [429]
* * * * *

The Court: The Court advises Counsel in the case, in view of all that has here been said and in reliance upon what has here been said as correctly stating the positions of respective Counsel, that the Court sees no conflict between any admitted fact, those stated in the pretrial order and those stated supplemental thereto during this trial, which is at variance [447] with the evidence sought to be adduced as declared by Mr. Howard by this exhibit marked for identification Defendant's Exhibit A-9 up to this time. [448]* * * * *

ALFRED L. ARVIDSON

(Resumed the stand.)

Mr. Howard: May we have before the witness—

The Court: Defendant's Exhibit A-9?

Mr. Howard: A-9.

The Court: That will be done.

(The exhibit was placed before the witness.)

Mr. Poth: I have no objection to the offering of that, your Honor.

The Court: Did you offer it or do you now?

Mr. Howard: I offer it now.

The Court: It is admitted, A-9. [515]

(Defendant's Exhibit No. A-9 for identification was admitted in evidence.)

Mr. Howard: Your Honor, has A-10 been admitted?

The Court: It has, for the limited purpose stated by Counsel when offering it and for no other purpose. It is received in evidence and the jury must not consider it for any purpose other than under the limitations stated by Counsel offering it, namely, in effect, that it is offered merely to illustrate, not what it says or shows, but what the witness orally stated from the witness stand.

* * * * *

Direct Examination—(Continued)

Q. (By Mr. Howard): What was the extent of the responsibility of the Seattle [516] Stevedore Company with respect to the discharging of cargo from the P & T Adventurer on July 14th and 15th?

(Testimony of Alfred L. Arvidson.)

The Court: Excuse me. The original of A-9 is now returned to Counsel who produced it.

Q. (By Mr. Howard): Did you get the question, Mr. Arvidson?

A. Yes. Well, their responsibility, their contract called for discharging the vessel, having the longshoremen aboard and the foreman and rigging the gear and having the men put the cargo on pallets and in the sling and then it's hoisted by the ship's gear to the dock and then—at ship's tackle, the sling comes down onto the dock, the stevedoring company has two sling men in their gang who unhook the load, and that's the end of their responsibility.

Q. Did the Seattle Stevedore Company have anything to do with moving the cargo from that point where it landed on the dock into the warehouse? A. No, sir.

Q. Who did that work?

A. The Olympic Steamship Company.

Mr. Howard: May the witness have before him Plaintiff's Exhibits 3 and 4?

The Court: That will be done.

(The exhibits were placed before the witness.) [517]

Q. (By Mr. Howard): Are you familiar with the documents before you now as Plaintiff's Exhibits 3 and 4? A. Yes, sir.

Q. Will you state whether or not those—what are they?

(Testimony of Alfred L. Arvidson.)

A. Well, they are tariffs for terminal—for dock work.

Q. Were those tariffs in effect and applicable to the operations being performed by Olympic Steamship Company at Pier 48 in connection with the cargo which was being discharged from the P & T Adventurer?

A. Well, they certainly——

Mr. Poth: We so stipulate, your Honor.

Mr. Howard: May we have an answer to the question, your Honor?

The Court: You may.

A. I would say that they are. It's what we work with, if the date is correct on them, if they are up to date for that particular time.

The Court: Will you apply to each of them a name which you think characterizes each so that we can by a name distinguish one from the other? What is Plaintiff's Exhibit 3? That is, referring to the manner by which you as a waterfront man would refer to it to distinguish it from some other thing.

A. Well, I would say this charge is for the account of the vessel. They go through here and see [518] what it would be.

The Court: You may proceed. The Court's question remains unanswered according to the Court's view of it. Proceed.

Q. (By Mr. Howard): Did Pope & Talbot, Inc. have any other contract or arrangement with Olympic Steamship Company with respect to the han-

(Testimony of Alfred L. Arvidson.)

dling of cargo discharged from the P & T Adventurer on July 14th and 15th? A. No, sir.

Q. Did the Olympic Steamship Company have anything to do with the actual physical discharge of the cargo from the holds of the vessel to the dock? A. No.

Q. Whose responsibility was it to wing in the gear that had been in use by the longshoremen on the ship?

A. The stevedore company, Seattle Stevedore Company.

Q. Whose responsibility would it be to supply hatch tents if hatch tents were required?

A. We always—it's always the stevedore company that supplies them.

Q. During the course of loading and discharging operations aboard the P & T Adventurer at Seattle would there be any occasion for any other workers or persons to come aboard from ashore?

A. Well, when a ship is in port there are quite a few [519] people come aboard. You have the—well, to start with, the Customs officials, the Immigration and Quarantine, Public Health. You could have surveyors, you could have shipyard workers, laundrymen, for a few.

Mr. Howard: I have no further questions.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Poth): Referring to Pope & Talbot's contract of carriage, that is the contract with

(Testimony of Alfred L. Arvidson.)

shippers, does Pope & Talbot's duty end at ship's tackle or is Pope & Talbot still responsible for having the cargo stored and tiered on the dock at first place of rest where the consignees can take it over?

A. Well, it depends on what trade that the ship is operating in. This is an intercoastal ship, and I'm sure the tariff calls for the cargo to be at place of rest on the dock.

The Court: From whose hands?

A. Sir?

The Court: From whose hands, please, with respect to the contract of carriage?

A. The intercoastal tariff would call for—the cargo would be at a place where the teamsters could [520] come down and pick it up.

The Court: That does not answer the Court's question. Does it say who shall put it there, whether the ship or somebody else will put it there, or if not either the ship or anyone else, how does it under the tariff applicable to the operation get to the place you mention?

A. It's rather hard for me. I'd like to find that in the tariff and I could tell you better. I'm sure that the rate, the intercoastal rate of so much a hundred pounds is from a place of rest on the dock on the east coast or from a car or a barge to——

The Court: The Court's question is not concerned with the rate. The question the Court asked you is if you know who, if anyone, agreed

(Testimony of Alfred L. Arvidson.)

here to handle this cargo in the manner that you have just stated. A. Well, I——

The Court: To bring about the result which you have just stated.

A. Pope & Talbot in order to follow the terms of their contract of freighting under the tariff arranges with someone to put the cargo at this place of rest on the dock.

The Court: You may inquire.

Q. (By Mr. Poth): And that place of rest on the dock is not [521] at the end of ship's tackle, is it, where it's temporarily disconnected for carriage across the dock to the place of rest?

A. Some cargo could be at the end of ship's tackle into a carload, into a car.

Q. Into a car. Well, I'm talking about cargo that doesn't go into a car, cargo that has to go into a warehouse and be piled or stowed.

A. That would be after it has been handled on the dock.

Q. Yes. A. And taken off the boards, yes.

Q. And not at the end of ship's tackle?

A. That's right.

* * * * *

(Witness excused.) [522]

* * * * *

SIDNEY RAYMOND CARLSON

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

(Testimony of Sidney Raymond Carlson.)

Mr. Howard: May we have Defendant's Exhibits A-4 and A-7 placed before the witness?

The Court: That will be done.

(The exhibits were placed before the witness.)

Direct Examination

Q. (By Mr. Howard): Will you state your full name, please?

A. Sidney Raymond Carlson.

Q. What is your residence address, Mr. Carlson?

A. 1318 North Callow, Bremerton, Washington.

Q. What is your present employment?

A. Chief Mate of the S. S. P & T Adventurer.

Q. And where is that ship at the present time?

A. She's laying at Pier 28 in Seattle. [471]

Q. How long have you been employed by Pope & Talbot, Inc.?

A. Since December of 1950.

Q. And how long have you been going to sea?

A. Well, this is my seventeenth year.

Q. That type of vessel is the P & T Adventurer?

A. It's a Victory type vessel.

Q. And what type of trade is it engaged in?

A. It's engaged in the intercoastal trade.

Q. How long have you served aboard the P & T Adventurer?

A. Well, I have been aboard her in various capacities. I made—let me see, I was on the vessel—at the time the accident happened, I joined the vessel on March the 9th of that year and left her

(Testimony of Sidney Raymond Carlson.)

in September. Then I came back in December of that year for another trip, then I joined her again this last—I guess it was in July.

Q. Were you Chief Mate on the P & T Adventurer on July 14th and 15th of 1956?

A. Yes, I was.

Q. Were you aboard the vessel at the time an accident occurred to Mr. Cordray on the early morning of July 15th? A. I was not.

Q. When had you last been aboard the vessel?

A. At, oh, early in the afternoon. About four o'clock in the afternoon of the day before I left and went home.

Q. And when did you next rejoin the vessel?

A. I came there the morning after the accident happened, I came aboard that morning.

Q. And where was the ship then?

A. Well, I joined her in Olympia.

Q. At Olympia. Where was the ship when you left it on the evening of July 15th?

A. It was laying on the north side of Pier 48 in Seattle.

Q. What operations were being engaged in aboard the ship at that time?

A. They were discharging cargo.

Q. Who was doing that work, if you know?

A. I believe it was the Seattle Stevedoring Company.

Q. Mr. Carlson, generally speaking or just in general outline, what are the duties of a Chief

(Testimony of Sidney Raymond Carlson.)

Mate aboard a vessel such as the P & T Adventurer? Describe the duties.

A. Well, they vary. There's quite a wide span. It's the primary duty of the Chief Mate to take care of the cargo operations of the vessel, see that the cargo is stowed properly, discharged properly, and that the cargo gear is in suitable condition to discharge the cargo, also to keep up the general appearance of the vessel, note any damage or any misuse of gear on the vessel. We also take care of the ship's medicine chest, assist with the payrolls, and assist the Captain in keeping the ship sanitary, and almost anything that comes up. [473]

Q. Before you left the vessel on the 14th of July did you make any observation as to the condition of the cargo-handling gear at the number two hatch?

A. Not a specific inspection of that particular gear, but I had been on deck and as usual made—when we're discharging cargo I try to get on deck as often as possible and look both on deck and aloft to see that things are in proper order.

Q. When you returned to the ship at Olympia on July 15th did you make any particular observation or inspection of the cargo-handling gear at the number two hatch?

A. Yes. Since it was brought to our attention that there had been an accident I went out immediately and looked at it and was shown what had happened, and then I—always when I join a vessel or come aboard in the morning if I've been

(Testimony of Sidney Raymond Carlson.)

gone I look and see the way the gear is rigged, that there are no parts of the gear rigged wrong so that they might part due to being rigged wrong, or make a general inspection.

Q. Were you present aboard the ship at Olympia when some pictures were taken by a commercial photographer? A. I was.

Q. And when was that?

A. As I recall it was in the either late forenoon or early afternoon of that day, the day the ship got to Olympia. [474]

Q. And what——

The Court: I wish we could have that date stated in this connection.

Q. (By Mr. Howard): What date would that be, Mr. Carlson? The accident happened on the early morning of July 15th at Seattle.

A. Well, I guess—I don't recall whether we shifted that day or it was the next day to Olympia, but it was—I don't recall the date right—it was the day that the photographer came down and that the attorney was aboard the vessel investigating it.

Mr. Howard: May the witness have placed before him A-1, the log book of the vessel?

The Court: That will be done.

(The exhibit was placed before the witness.)

The Court: Will you name that attorney?

A. I believe his name was Soriano, as I recall.

Q. (By Mr. Howard): By reference to the log book, Mr. Carlson, can you determine when the vessel shifted to Olympia?

(Testimony of Sidney Raymond Carlson.)

A. Yes. I was just looking here. The vessel shifted starting at 7:38—they finished the cargo at 7:38 that morning. [475]

The Court: What morning, what date?

A. The morning of July 15, 1956, and at 7:46 the engines were put on standby preparatory to leaving the dock.

Q. (By Mr. Howard): And when did the ship arrive at Olympia?

The Court: If it did arrive there.

A. The vessel was all fast and tied to the dock in Olympia at 11:38 the morning of the 15th, 1956.

The Court: The hour, please, again?

A. 11:38, sir.

Q. (By Mr. Howard): And when did you re-join the vessel with relation to that time that you just mentioned?

A. I came aboard the vessel that morning in Olympia.

Q. That morning? A. When she docked.

Q. Mr. Carlson, will you describe to us briefly the relationship and the division of responsibility as between the mates of the vessel, the supercargo and the stevedore foreman?

A. Well, the Chief Mate is in direct charge of the cargo operations subject to the Master's discretion. The junior mates, the second, third and fourth mate, are under the direct responsibility of the Chief Mate to see that cargo operations are carried out and that pilferage doesn't occur and that proper stowage is [476] made and to check on

(Testimony of Sidney Raymond Carlson.)

the operation in general. The responsibility for the distribution of the cargo lies with the supercargo. He has information as to the amount of cargo, the type, and all the information about the cargo when the vessel comes in and he plans the loading of the vessel and discusses with the Master and the Chief Mate his ideas of how he should load the cargo.

Q. How about the discharging operation?

A. The same occurs on the discharge. He receives a plan of the cargo in the vessel from us that is made up by the supercargo where the vessel was loaded and checked by me ahead of time, and he calls the necessary stevedores, arranges for the necessary equipment and gear and sees that everything is there that is necessary to discharge the cargo, and also takes care of incidentals such as calling, oh, various things like trash wagons to remove debris from the ship and any of those operations.

And the stevedore foreman is directly in charge of the men themselves that are working on the ship. He rigs the gear. When the ship comes in the booms and the cargo-hoisting gear is up in position but not in a position actually to work the cargo, as it were, because of the fact that the booms must be inboard [477] of the ship so they won't hit the dock when the vessel is brought in. Then when the stevedores come aboard the foreman delegates the gangs of stevedores to the various hatches.

Q. What foreman is that?

(Testimony of Sidney Raymond Carlson.)

A. The stevedore foreman. And then they adjust the booms and the cargo-hoisting gear to suit the necessity of where they are going to discharge the cargo. The gear has to be spotted so that the hook that the cargo is hooked on comes down directly over the cargo, so that it necessitates them adjusting the gear to suit themselves.

Q. Who is directly responsible for the physical operation of removing the cargo from the holds of the vessel and placing it on the dock?

A. The stevedores load the cargo, depending on the type, on pallet boards and hoist it ashore, or if it's heavy cargo, it might be slings put on the cargo and hoisted out to the hooks, but it is the stevedores that move the cargo bodily from the holds and onto the dock.

Q. Are you familiar with a worker known as a dock foreman? A. Yes.

Q. At Seattle? A. Yes.

Q. What are the duties of a dock foreman?

A. The dock foreman takes care of the wharfmen, the fellows [478] that receive the freight from the ship's side. They have a plan of how they wish the cargo to be, according to the bills of lading and consignees, so that the cargo is placed on the dock in such a way that it can be distributed by the shipper as the consignees call for it with their trucks.

Q. Are the men working under the dock foreman members of a union? A. Yes.

Q. And what is the name of that union?

(Testimony of Sidney Raymond Carlson.)

A. The Longshoremen and Warehousemen's Union.

Q. Longshoremen and what?

A. Warehousemen's Union.

Q. Now, Mr.—

The Court: May I ask, what if any union were those who on this occasion were working inside and on the ship members of?

A. They are members of the Longshoremen and Warehousemen's Union, the same as the men on the dock.

Q. (By Mr. Howard): That's all one union, the Longshoremen and Warehousemen's Union?

A. Yes, sir.

Q. Not two unions?

A. Not that I know of, no, not here in this port.

Q. Referring you to the pictures which are before you as [479] A-7 and A-8, I'll ask you if you can identify those as to the pictures which were taken at the time you describe on July 15th or thereabouts? A. They are the pictures.

Q. And were you present when those pictures were taken?

A. I was present when they were taken.

Q. Now, Mr. Carlson, I'll ask you if you can find on either one of those pictures a gin block?

A. I can.

Q. Would you encircle that with a pen, please, and mark it out in the margin "Gin block" with a line leading to it?

(Witness does as requested.)

(Testimony of Sidney Raymond Carlson.)

Q. What is the function of a gin block?

A. The gin block provides a frictionless means of securing the hoisting wire to the head of the boom. In other words, it provides a vehicle for the hoisting wire to run through so that the wire goes from the winch on the deck of the vessel to the head of the boom and through the gin block and back to the cargo hook, the reason for the booms being to get the cargo up in the air to clear all the things on the ship's side.

Q. It carries the cable or wire then that is used in lifting the cargo, is that correct?

A. That is true. [480]

Q. Now would you look again at those pictures and tell me if you see in there a guy?

A. I do.

Q. Would you mark the guy on one of the pictures, whichever one it shows most distinctly on?
(Witness does as requested.)

Q. And also is there a preventer appearing in either one of those pictures? Now have you marked the guy on the picture? A. Yes, sir.

Q. Look at the back. Which number is that?

A. This is A-8.

Q. On A-8. Have you marked the preventer on A-8? A. No, I haven't.

Q. Will you mark an arrow or something to the preventer?

A. Well, it just shows briefly here.

Q. Does it appear better in the other photograph, Mr. Carlson?

(Testimony of Sidney Raymond Carlson.)

A. Yes, the preventer appears better in the other photograph.

Q. Would you mark the preventer on the other photograph? That would be A-7.

(Witness does as requested.)

Q. What is the function of the guy and the preventer?

A. They act to hold the boom in position as the cargo is [481] being hoisted. If they weren't there the booms would find themselves in a position directly over the cargo, so in order to hold the booms out over the dock so that the cargo can be hoisted to the dock they must be held back into that position. The side guy makes the adjustable part of it. The preventer aids the side guy and acts as an additional safety factor. It has no moving parts and it's chained back into position when the proper setting is found. The preventer is made fast, then the two of them are adjusted by the guy until they take an equal part of the load, so that there's a load on both of them.

Q. They bear the load from the boom and whatever is suspended from the tackle at the end of the boom?

A. Yes. It's not a direct load. They keep the—they bear the load of keeping the boom in position for hoisting. The direct load is supported by the cargo-hoisting runner.

Q. Yes. Now, Mr. Carlson, what is a shroud?

A. Shrouds are large wires made fast to the deck head with turnbuckles that run to the head

(Testimony of Sidney Raymond Carlson.)

of the mast to keep the mast in position from strain and stresses of working cargo.

Q. Is there a shroud visible in either one of these pictures? A. Yes, there is. [482]

Q. And on which picture, please?

A. That is on A-7.

Q. Would you mark it on A-7, please?

(Witness does as requested.)

Q. Is there a Samson post or king post visible in either one of those pictures?

A. Yes, there is.

Q. At what hatch?

A. The number three hatch at the after end.

Q. Would you mark that, please.

(Witness does as requested.)

Q. Now, is there a Samson post or king post at the number two hatch where this accident occurred?

A. No, there isn't.

Q. What is there in lieu of a Samson post or king post?

A. There is a mast that is stepped from the deck and a mast house built around it.

Q. Is the mast house or any portion of it visible in either one of those pictures?

A. Yes, it is.

Q. Would you mark the mast house and mark an arrow to it?

(Witness does as requested.)

Q. Is any part of the mast itself at number two visible in the pictures?

A. Only the very tip of the crosstree. [483]

(Testimony of Sidney Raymond Carlson.)

Q. What is the crosstree?

A. Well, that's an extension from the top of the mast that goes out towards the side of the ship that supports the boom. It supports another block called the topping block.

Q. Is there any portion of the mast extending above the crosstree?

A. Not of the part that supports the weight, no.

Q. Will you mark by an arrow the crosstree as it appears in the picture?

(Witness does as requested.)

Q. Now, is there any hatch tent gantline intact visible in either one of those pictures?

A. Yes, there is.

Q. And at what hatch is the one visible?

A. The one that's completely visible is at the forward end of number three hatch.

Q. On which side of the ship?

A. That would be on the starboard side of the ship.

Q. Now will you draw an arrow to identify that hatch tent gantline? I would suggest that it be to the upper part of the hatch tent gantline.

(Witness does as requested.)

Q. Is there any other hatch tent gantline or portion of a hatch tent gantline visible in either one of those [484] pictures?

A. In both photographs the remains of a hatch tent strap, the block supporting strap, is there.

Q. On what boom?

A. On the starboard number two boom.

(Testimony of Sidney Raymond Carlson.)

Q. And is that marked now in the picture, on either one of those exhibits?

A. Yes. It says "Gantline".

Q. Is it identified correctly as to what you now refer to?

A. Yes. It might be a little confusing as to the arrow, but——

Q. How about on the other picture, is it marked? A. It's not marked on A-7.

Q. Would you mark it, please, on A-7?

(Witness does as requested.)

Q. Did you have occasion to observe that upper portion of the hatch tent gantline or strap at the number two starboard boom when you returned to the ship at Olympia? A. From the deck, yes.

Q. Will you state whether or not as you observed it it appeared the same as it now appears in this picture? A. Yes.

Q. Is there any difference?

A. It appears exactly as it looked the morning I observed it. [485]

Q. What does that appearance indicate to you as far as the cause of the break is concerned?

A. It appears to me than an unusual strain beyond the capabilities of the wire was put on it.

Q. Why?

A. Because of the fact that the strap was not being used properly. In fact, it should not—it was not being employed and was made fast, and as the boom was winged in rather rapidly a strong strain was put on it and it parted the strap.

(Testimony of Sidney Raymond Carlson.)

Q. What about the appearance of the strap in the picture causes you to state that?

A. Because the wire—I've seen many wires part, and wire under an extreme strain begins to part a strand at a time, and then the load on the wire itself becomes distorted and will tear the wire out in unusual forms. It unravels it and tears it and generally destroys it.

Q. How long did that upper portion of the wire strap remain attached to the tip of the number two starboard boom?

A. The strap was still on the tip of the boom, the portion of it, when I left the vessel in New Jersey in September, the first part of September.

Q. Had the number two booms been lowered prior to that time? A. They had not. [486]

Q. And why not?

A. Because when the vessel loads on the West Coast we take lumber on deck and the lumber is piled high enough that in order for the boom to be lowered, the lumber would get in the way. In other words, the arm effect of the boom coming down would strike the lumber and it makes it impossible to lower the boom.

Q. What is done with the booms then when they are secured for sea?

A. In the crosstrees of the masts are collars, and the booms are brought into an upright position and made fast in the crosstree themselves in order to keep them there.

Q. Referring you again to these pictures, Mr.

(Testimony of Sidney Raymond Carlson.)

Carlson, I'll ask you whether there is any portion of the gantline itself, the Manila, lower portion of the hatch tent gantline, for any of the hatches visible in the pictures? A. Yes.

Q. And where is that?

A. Made fast to the block that I have pointed out here.

Q. I'm talking about the lower portion of any hatch tent gantline.

A. Yes, there's one in this photo here running from the block down to the deck.

Q. And made fast where? [487]

A. This one appears to be made fast to the bull rail. I can see the line there. It doesn't appear to be bent on at all, it seems to be just standing there. I would say that this one is made fast to the shroud, because it's laying loose over the rail and there's knots on the bottom as though it were made fast to the shroud.

Q. Would you draw an arrow to that, please?

A. Yes.

(Witness does as requested.)

Q. On which exhibit are you doing that?

A. A-7.

Q. Is there any portion of the hatch tent gantline for the number one starboard boom visible in either one of these pictures?

A. The number one?

Q. Number one. A. Yes.

Q. And where is that made fast?

(Testimony of Sidney Raymond Carlson.)

A. It's made fast to the railing at the after end of the hatch.

Q. Now would you mark that "No. 1 gantline"?
(Witness does as requested.)

Q. Did you observe the Manila of the gantline at number two starboard boom when you returned to the ship on July 15th at Olympia? [488]

A. Of the number two boom?

Q. Number two. A. Yes.

Q. Was it made fast anywhere?

A. No, it was lying on deck when I seen it.

Q. Did you observe that gantline before you left the ship on July 14th?

A. Not specifically. I might have observed it in passing, but there was nothing unusual to make a mental note of.

Q. Where are they usually made fast?

A. If they're in use, one end is made fast to the tent itself and the other to the deck some place where there's an available cleat.

Q. Assuming that there is no hatch tent in use, where would they be made fast?

A. The ends of the gantline are knotted together to make an endless line so that it can't be lost out of the block, and they're generally taken back out of the way of the working rigging, since they're not in use, and made fast some place to keep them out of the way.

Q. Would that be similar to that shown for number one gantline in A-7?

A. Yes. The number three shows it definitely

(Testimony of Sidney Raymond Carlson.)

back and out of the way, because if it weren't made fast it would hang directly into the loads of cargo and be in the way [489] for working.

Q. Now, you have referred to the position of booms when you have a deck load being secured in an upright position? A. Yes.

Q. I wonder if you would take the sheet of paper which has been placed before you marked as Exhibit——

Mr. Howard: Is it A-10?

The Clerk: It will be A-10, Defendant's A-10.

(A sheet of paper was marked Defendant's Exhibit No. A-10 for identification.)

Q. (By Mr. Howard): And draw a sketch on that showing how the boom at number two hatch would be secured for sea with a deck load.

A. With a deck load?

Q. With a deck load of lumber.

The Court: Is that to illustrate something he has already said or something you are about to ask him?

Mr. Howard: I was going to ask him about it.

The Court: Ask him the question orally first. It may not be material.

Q. (By Mr. Howard): When the boom at number two hatch is secured for sea with a deck load of lumber, is there a collar? [490] A. Yes.

Q. And where is that collar located with reference to the upper end of the boom?

A. Well, it's something — it's in the crosstrees

(Testimony of Sidney Raymond Carlson.)

and the boom extends up roughly I would say between ten and fifteen feet above the collar.

Q. And how is the hatch tent gantline secured when the boom is in an upright position prepared to go to sea?

A. Well, with a deck load the gantlines are brought out away from the boom so that they're tied off on the lashing chains on deck in order to keep them from chafing as the wind blows them back and forth so that they won't get rubbed or chafed to the point so as to weaken them.

Q. Can you draw a picture describing that that you have just now testified to? A. Yes.

The Court: Using Defendant's Exhibit A-10 for identification for that purpose.

(Witness draws on Defendant's Exhibit No. A-10 for identification.)

Q. (By Mr. Howard): Have you marked on this Identification A-10 the various parts of the ship's gear and fixtures that you have referred to in your testimony this morning?

A. Do you wish the gin block and those things in there? [491]

Q. Is the gin block marked?

A. I haven't put a gin block on it.

Q. You haven't put a gin block on it?

A. No.

Q. Will you do so, please?

A. Yes, I can put one on this.

(Witness does as requested.)

Q. Have you marked the hatch tent gantline?

(Testimony of Sidney Raymond Carlson.)

A. I have.

Q. Have you marked the mast?

A. I have.

Q. Have you marked the side or rail of the ship?

A. No.

(Witness marks.)

Q. Have you described the deck load?

A. Yes.

* * * * *

Q. (By Mr. Howard): Will you state whether or not the hatch tent gantline, in particular the wire strap and block at the upper end of the same, would come in contact with any part of the mast or cross-tree as it is secured for [492] sea at number two hatch in upright position?

A. No, it is made fast in that position to avoid that.

Mr. Howard: I offer in evidence Defendant's Exhibit A-10.

The Court: For what purpose?

Mr. Howard: Illustrative purposes, to illustrate his testimony.

Mr. Poth: I have no objection, your Honor.

The Court: As so limited Defendant's Exhibit A-10 is now admitted.

(Defendant's Exhibit No. A-10 for identification was admitted in evidence.)

Q. (By Mr. Howard): Now, Mr. Carlson, when you don't have a deck load how are the booms at number two hatch secured for sea?

A. They are lowered into—well, not quite a hori-

(Testimony of Sidney Raymond Carlson.)

zontal position, but lowered until they can be reached from the deck. They are lowered down to cradles on top of the forward mast house.

Q. When they are lowered into those cradles what if any portion of the outer upper end of the boom would extend out and beyond the cradle?

A. Well, from the cradle itself to the end would be ten or twelve feet.

Q. What is the length of the wire strap and hatch tent [493] gantline as used on the P & T Adventurer?

A. Well, it varies somewhat, depending on just how the boom is—the gear is set up, but it's made up so that the block hangs approximately a foot below the gin block, so that it clears the gin block.

Q. Well, what would be the range of length of the wire strap?

A. In the vicinity of five feet.

Q. And how is that wire strap on the hatch tent gantline secured when the booms are lowered into the boom rest at the number two hatch preparing to go to sea?

A. Well, the head of the boom hangs out just about to the square of number one hatch, in other words the hatch itself, and ordinarily the gantline itself, the Manila portion of it, is coiled down on the hatch and tied back away onto the cross battens on the hatch to keep them out of the way and in the clear.

Q. Does any part of the wire strap in the hatch tent gantline of the number two boom come into

(Testimony of Sidney Raymond Carlson.)

contact with the boom rest or the collar on the boom rest? A. No.

Q. Does it come in contact with any other portion of the vessel while the booms are secured at sea? A. In the lowered position?

Q. In the lowered position. [494]

A. No, it would be hanging just straight down.

Q. Is there any opportunity for chafing or pinching of the wire in the hatch tent gantlines while the booms are secured for sea in either the upright or the lowered position? A. No.

* * * * *

Q. (By Mr. Howard): Mr. Carlson, what if any procedure did you have on the P & T Adventurer for inspection and maintenance of the hatch tent gantlines during the course of your voyages?

A. Well, usually the gear eastbound is up in the upright position, and unless there's something that we know is definitely in a bad condition there's usually nothing, no maintenance done to it on the eastbound voyage. But then westbound the gear is laid down and each voyage westbound the gear—I have the boatswain, who is my assistant and is in direct charge of the sailors, goes [495] along with me from one end of the ship to the other with a notebook and we note any defects, any chafed rope or blocks, we have a regular—we try to get the blocks overhauled as regularly as possible, and any runners with what we call fishhooks, with broken strands in them, are replaced, and well, the general condition of the gear is checked and any renewals or replacements that

(Testimony of Sidney Raymond Carlson.)

are necessary is done before we get into Los Angeles.

Q. Is there any maintenance that is provided beyond this inspection and checking and replacement?

A. Well, the gear is—the carpenter greases all the moving parts once a trip, and the inspection is made for the purpose of maintenance. What I mean, if any particular guy is in good condition it's not taken down, but if there's a guy that's in bad condition, why it's replaced to make it safe again.

Q. Does the inspection which you refer to include the inspection of the hatch tent gantlines?

A. It includes inspection of all the——

Q. And the wire straps?

A. Everything.

Q. And how frequently would the wire straps and the hatch tent gantlines be inspected, such as were used at number two hatch on this vessel?

A. Well, our round trip voyages are about two months, so at least every two months they are closely inspected.

Q. Now, when you returned to the vessel on July 15th at Olympia did you have occasion to look at the lower part of the wire strap that had been involved in this accident? A. I did.

Q. Where was it located then?

A. It was located in the supercargo's room, a spare room that we have on the ship.

Q. Now will you look at the exhibit before you as A-4 and state whether or not that is the same

(Testimony of Sidney Raymond Carlson.)

piece of gear that you inspected on July 15th when you returned to the ship at Olympia?

A. Yes, that is the piece.

Q. Is that the same block?

A. Yes, I would certainly say it is, sir.

Q. And looking at the wire, is that the same wire? A. Yes.

Q. Looking particularly at the appearance of the wire, will you state whether or not it appears in the same condition as you observed it when you inspected it at Olympia on July 15th?

A. Yes, because the lawyer and I had the wire out and was looking it over and making remarks about the way the [497] wire had broken.

Mr. Poth: Just a minute. I'll object. That's hearsay.

The Court: I believe the question has been answered.

Q. (By Mr. Howard): What was done with this broken portion of the wire strap after you inspected it at Olympia on July 15th?

A. It was taken with—the lawyer took it with him.

Q. Now will you look carefully at the wire and tell me whether there's any difference in the appearance of the wire now as distinguished from that that you observed on July 15th?

A. None that I can tell.

Q. Now will you look, please, at the pictures again, Mr.—

(Testimony of Sidney Raymond Carlson.)

Mr. Howard: I would like to have also A-2 and A-3 before the witness.

The Court: That may be done.

(The exhibits were placed before the witness.)

Q. (By Mr. Howard): And I'll ask you if the block that you have described in the hatch tent gantline intact at number three starboard boom in Exhibit A-7 is the same type of block as appears in the Exhibit A-4 before you?

A. Yes, it's the same. [498]

Q. Is there any sleeve, bolt or grommet on the hatch tent gantline block that appears in the pictures A-3 and A-7 and also in the other picture A-2 which you have before you? A. No.

Q. Do you use a block with a sleeve, bolt or grommet for hatch tent gantlines on the Pope & Talbot vessels? A. No.

Q. Is there any need to have a bolt, sleeve or grommet on a hatch tent block? A. No.

Q. Gantline block. Mr. Carlson, how many years did you say you've been going to sea?

A. This is my seventeenth year.

Q. From your experience in seventeen years at sea will you state whether or not you would consider it safe for a person to stand under the boom and gear while the operation of winging in or swinging in the boom was taking place? [499]

* * * * *

A. No, I wouldn't say that it's a safe position to be in. Amongst seamen it's the customary prac-

(Testimony of Sidney Raymond Carlson.)

tice to stay out of what we call the bight of the line, or stay away from where the power or pressure is being applied. In other words, if something were to give, why it would go away from you instead of towards you, or if anything were to fall you would be out from under it, so that in any event of something parting or somebody making a mismove, like maybe letting go of a line that shouldn't be let go, why, should the gear involved get away or get out of hand, that there wouldn't be anybody in a position [503] of the possible path of it.

The Court: You may inquire.

Q. (By Mr. Howard): Mr. Carlson, from your experience at sea do seamen or crew members ever have any work—do they ever perform any work on the dock in handling cargo on the dock?

A. No.

Q. Does the dock foreman have any duties to perform aboard the ship?

A. No, no duties in direct connection with the operation of the cargo that I know of.

Q. What other types of workers might be aboard a ship such as the P & T Adventurer during the course of loading and discharging operations?

A. Well, there might be repairmen from shore——

Mr. Poth: I'll object, your Honor, on the ground of relevancy.

The Court: On the question of relevancy have you any statement?

Mr. Howard: Well, your Honor, we believe that

(Testimony of Sidney Raymond Carlson.)

it might be quite relevant under the instructions the Court may give in this case to show that there are various types of shore workers and employees, persons from the shore that may be aboard a vessel during the course of loading and discharging operations, but—— [504]

The Court: The objection is sustained.

Mr. Howard: That's all the questions I have.

The Court: You may inquire on cross examination.

Cross Examination

Q. (By Mr. Poth): When did you start with Pope & Talbot? A. In December of 1950.

Q. 19 what? A. 1950.

Q. And in what capacity did you join your first vessel? A. As Third Mate.

Q. Third Mate? A. Yes.

Q. And how long did it take you to get to be Chief Mate?

A. I got my first Chief Mate's job, let's see, in 19—It would be '55.

Q. Five years it took you to work up to Chief Mate? A. Yes.

Q. What are you now? A. Chief Mate.

Q. That's next to the Captain, is that right?

A. Yes.

Q. Your next step is to be a Master of your own ship? [505] A. Yes.

Q. Do you recall what time you joined the vessel down at Olympia on the 15th of July?

A. I don't recall the exact time, no.

(Testimony of Sidney Raymond Carlson.)

Q. Was the ship working cargo when you got there?

A. No. I came aboard—I was aboard when the cargo gear was rigged.

Q. Pardon?

A. I was there, I came there as they rigged the gear. I was there when they were just starting the operation.

Q. Starting to rig the gear? A. Yes.

Q. Now, where did you first go?

A. Well, I don't recall. I went out on deck, just a general look around the ship. Unless there's something specific that somebody wants I just go out and make a sort of a tour of the deck.

Q. When did you first hear there had been an accident? A. As soon as I came aboard.

Q. And did you go inspect the block at that time? A. Yes.

Q. Do you recall who the supercargo was?

A. I'm not positive, but I do believe—I don't recall having any other than Mr. Tretheway. I believe he was the supercargo. [506]

Q. You mentioned the supercargo's room aboard the vessel. Where was that room?

A. It's a spare room that we have on the — it would be the beat deck on the port side of the vessel in the forward part of the midship house.

Q. And what sort of a room is it?

A. It's just an ordinary—it had been an officer's room when we had—during the war the vessels carried additional officers. I don't recall exactly whose

(Testimony of Sidney Raymond Carlson.)

it was, but there's a bunk and two lockers in the room and we have built a table for the supercargo to put his plans down on, or a desk for him to work from.

Q. And does the supercargo travel with the vessel from Seattle to Olympia? A. No.

Q. Was there a supercargo aboard the vessel when you got down there?

A. I don't know if he was aboard the vessel. If he wasn't aboard the vessel he was out in the dock office probably checking on the lumber lineups and so on.

Q. And how big a room was this?

A. The room I would say is about, oh, eight by twelve.

Q. It has a table in it and it's used as an office, is that right?

A. Yes, just roughly speaking. They just keep the plans in [507] there. Some of them don't even use it for that. On this coast it's more customary in some places to make the plans ashore, but where they wish to come aboard we have that. It's just a piece of plywood built in so they can pin their plan on it.

Q. Who was in the supercargo's room when you went there to see the block?

A. There was no one in the room.

Q. Who took you there?

A. The Second Mate.

Q. Was the room locked up? A. Yes.

Q. Now, I believe you mentioned that this pen-

(Testimony of Sidney Raymond Carlson.)

nant, this portion of this pennant that you saw hanging from the boom at the number two hold stayed up there as long as you were on the ship; is that right? A. That's correct.

Q. The strand stayed there?

A. Yes, the eye and the remaining strands.

Q. And I believe you also testified that you never did get a close look at it; is that right?

A. Not right up so that I could touch it, no.

Q. Well, after the booms had finished working cargo at Olympia did you go to sea?

A. Yes, I believe we did finish the cargo in Olympia. [508]

Q. What position did you put the booms in?

A. In the upright position.

Q. You raised them up in the air?

A. Yes.

Q. Now, it's a simple job to raise or lower a boom, isn't it? A. Relatively so, yes.

Q. I believe you mentioned that you inspect these tent gantline straps—they are also called pennants, are they not? A. They can be, yes.

Q. That wire on there is also called a pennant?

A. Yes.

Q. I believe you stated that you inspect them every two months; is that right?

A. Definitely every two months they are closely inspected, but if we are working on some other gear, why I think more through habit than anything I always look at all the gear.

Q. When did you leave the vessel? You men-

(Testimony of Sidney Raymond Carlson.)

tioned you left it in September. What date was that?

A. I don't recall the exact date. I was transferred to another vessel.

Q. Well, you knew that that pennant up there was broken, did you not? [509] A. Yes.

Q. And the accident happened on July 15th and you left the vessel in September? A. Yes.

Q. And it hadn't been inspected or repaired, had it?

A. No, because during the—we never use gantlines on the east coast and the only place that we would have any use for a gantline again would be when we got up into the Northwest, so that I wasn't concerned with it because when we come——

Q. Doesn't it ever rain in New York?

A. Yes, but they won't work cargo when it rains.

Q. There are no tents used in New York?

A. They've never been on any vessel that I've been on. We don't load in New York and it's only lumber that we have in the ship when we get there, so it doesn't make any difference if it does get wet.

Q. You bring cargo from the east coast, do you not? A. Yes.

Q. General cargo? A. Yes.

Q. Where do you load that cargo?

A. Starting in Philadelphia.

Q. Doesn't it ever rain in Philadelphia?

A. Yes. [510]

Q. Do you use tents there when you're loading general cargo?

(Testimony of Sidney Raymond Carlson.)

A. No, because if it starts to rain the stevedores cover up and quit.

Q. Where else do you load cargo?

A. In Baltimore.

Q. And they don't work when it rains there?

A. No, sir.

Q. Do they work any place but in Seattle when it rains?

A. On the Columbia River or in San Francisco.

Q. It's just out here that they work ships when it rains?

A. When it rains hard enough to be of any consequence so that the stevedores would get wet, why on the east coast they all quit.

Q. Do they do that in Philadelphia also?

A. Yes, sir.

Q. And Baltimore? A. Yes, sir.

Q. What about the Gulf?

A. We don't stop in the Gulf, sir.

Q. So everywhere on the east coast is it that the longshoremen refuse to work, or is it that you just shut down operations?

A. Well, the stevedores won't work in the rain. They have that, I guess, in their agreement or in their working rules that they won't work in the rain. [511]

Q. What about when it snows?

A. If it snows heavily they quit then, too.

Q. Well, now, when you came back there that morning or that day, the 15th, and you saw that broken pennant up there, you didn't lower the

(Testimony of Sidney Raymond Carlson.)

boom down to take it off, did you? A. No, sir.

Q. That easily could have been done, could it have not?

A. It could have been done but it would have meant stopping the stevedore operations, and that could prove quite costly.

Q. Well, your crew raised the boom up, did they not, when you went to sea? A. Yes.

Q. Why couldn't they have lowered the boom down at the same time and taken that piece of strap off of there?

A. Because the lumber in the deck load was so high that the lower part of the boom would have hit the lumber and damaged the boom. It couldn't have been——

Q. How long were you in Olympia?

A. I think about a week.

Q. Did you put a deck load on?

A. Yes.

Q. How high a deck load did you put on?

A. I don't recall exactly, but the average deck load is [512] around ten feet.

Mr. Poth: May I have the log book, please?

The Court: That will be done.

(Defendant's Exhibit No. A-1 was handed to Mr. Poth.)

Q. (By Mr. Poth): Where did you leave the ship in September?

A. In Port Newark, New Jersey.

Q. Was that the last port of call?

(Testimony of Sidney Raymond Carlson.)

A. No, I believe she had—no, she had more lumber in her yet, I believe.

Q. Down in the hold? A. Yes, sir.

Q. But the deck load was all gone? A. Yes.

Q. Well, when her deck load was all gone why didn't you lower the boom down and take that piece of strap off?

A. Because I was told that—all I was told about the strap——

Q. I'll object to what you were told. I'm just saying you didn't do it, did you?

A. No, because there was no necessity—I didn't see no necessity of it.

Q. Well, it was a part of the ship's gear that needed replacing, wasn't it?

A. But it didn't need replacing then. [513]

Q. Well, didn't you feel that it was a valuable piece of evidence?

A. I was told that it was.

Q. That piece was—you were told that it was a valuable piece of evidence? A. Yes.

Q. Well, do you know whatever became of it?

A. I do not.

Q. You don't see it around here, do you?

A. No, not the remaining piece.

Mr. Poth: I believe I just——

The Court: You may have a moment.

(Brief pause.)

Q. (By Mr. Poth): Isn't it true that long-shoremen, particularly hatch tenders and winch

(Testimony of Sidney Raymond Carlson.)

drivers, constantly work under the gear, as you call it?
A. Yes, when the gear is set.

Q. And is it normal to expect that a tent gant-line block will fall down on you if you're standing under the gear?
A. No, not specifically. [514]

* * * * *

The Court: Does the defendant rest?

Mr. Howard: The defendant rests.

The Court: Any rebuttal by the plaintiff?

Mr. Poth: The plaintiff has no rebuttal, your Honor.

The Court: Does the plaintiff rest?

Mr. Poth: The plaintiff rests. [523]

* * * * *

(The following proceedings were had in the absence of the jury:)

Mr. Howard: May I take up one matter briefly in the absence of the jury, your Honor?

The Court: You may proceed.

Mr. Howard: At the close of all of the evidence defendant moves under Federal Rule of Civil Procedure 50 for a directed verdict against the plaintiff and in favor of the defendant Pope & Talbot, Inc., upon the following specific grounds:

1. That all of such evidence introduced in this case fails to show that plaintiff is entitled to relief from the defendant on the ground of unseaworthiness. [524]

2. That all such evidence fails to show that plaintiff is entitled to relief against defendant on

the basis of negligence or negligent failure to perform any duty owing from defendant to plaintiff.

3. That all such evidence fails to show any unseaworthiness of the vessel or negligence of defendant on the basis of which plaintiff would be entitled to recover against defendant.

Your Honor heard rather extensive argument on these same points at the close of plaintiff's case and I don't intend to go over the same ground again.

The Court: And the Court is now additionally benefited by the discussions between the trial judge informally made between the trial judge and Counsel yesterday afternoon.

Mr. Howard: Yes, your Honor.

The Court: The challenge is overruled and the motions and each and all of them are denied. Does that respond accurately to your statement of the legal questions on the record, Mr. Howard?

Mr. Howard: On the record I would like to make this additional motion, if the Court please.

The Court: You may do so.

Mr. Howard: Defendant moves first to withdraw from the consideration of the jury any issues as to [525] liability based on unseaworthiness on the ground and for the reason that the plaintiff is not within the class of workers which the Supreme Court and the Ninth Circuit Court have held is entitled to recover from a shipowner on the doctrine of unseaworthiness.

The Court: The motion is denied, because the Court believes that under the evidence in this case the Court should submit the case to the jury, especially with the aid which Counsel desire to give to the Court respecting proper instructions which should and the Court expects will be given on this question of seaworthiness and on the questions and reasons on such allied phases of the subject as will embrace a proper dealing with the reasons stated by movant at this time.

Mr. Howard: Finally, defendant moves to withdraw from the consideration of the jury any issue as to liability based on a charge of negligence on the ground and for the reason that defendant contends that there is absolutely no evidence in this case of negligence of the defendant. [526]

* * * * *

The Court: The motion stated by Mr. Howard is denied, the one last made by him and relating to the subject of negligence.

Mr. Howard: May the record show exceptions to the Court's ruling on each motion?

The Court: The record will show exceptions to the Court's ruling as to each and all of these motions and challenges stated by Mr. Howard for the defendant since both sides rested and all of the evidence was closed in this case, and in so far as it was the statement of an objection the objection is overruled. The exception is noted in the record effectively.

Now does the plaintiff wish to make a further statement?

Mr. Poth: Yes. Also in accordance with Rule 50 we wish to move for a directed verdict on the ground of the unseaworthiness of the vessel and on the negligence either of the officers of the crew of the vessel or other personnel aboard the vessel, mainly because the plaintiff has made a prima facie case which has in no way been rebutted by any reasonable inference to be [528] derived from evidence adduced in this cause on behalf of the defendant.

The Court: The motion is denied. Is there anything else to come before the Court? (No response.)

* * * * * [529]

(Thereupon, oral argument was presented to the Court and jury by Mr. Poth in behalf of plaintiff and by Mr. Howard in behalf of defendant.) [530]

* * * * *

The Court: Members of the jury, you have heard the testimony and received the evidence and you have heard the arguments of Counsel. After the Court instructs you, you will retire to the jury room to consider your verdict.

In this case, the parties have agreed to the following admitted facts, and you will accept them as true without proof, namely:

I.

That the plaintiff, Jack V. Cordray, age 36 at the time of the accident, is now, and at all times herein mentioned, has been a resident of Seattle,

King County, State of Washington, that place being within the territorial jurisdiction of this Court.

II.

That the defendant, Pope & Talbot, Inc., a corporation, is a foreign corporation, incorporated under the laws of the State of California, with its principal place of business in San Francisco, California; that at all times herein pertinent, said defendant was doing business, and had a place of business, in Seattle, King County, State of Washington, and was the owner and operator of the steamship P & T Adventurer, said vessel being employed as a merchant vessel on the navigable waters of Puget Sound, and elsewhere. [533]

III.

That there exists a diversity of citizenship between the plaintiff and the defendant, and the venue of this action is properly in this Court.

IV.

That prior to the 15th day of July, 1956, the defendant entered into a contract with Seattle Stevedore Co., said company agreeing to act, and acting at all times mentioned in this complaint as an independent contractor, having complete control and supervision of all operations pertaining to the discharge of cargo from the holds of defendant's said vessel to the ship's side at Pier 48, in the Port of Seattle, in the navigable waters of Puget Sound, on the said 15th day of July, 1956.

V.

That prior to the 15th day of July, 1956, on which date plaintiff was engaged in the moving of cargo from ship's side to place of rest on dock or railway car, the defendant entered into an agreement with Olympic Steamship Co., Inc., to, in the course of its own public dock business and not as the appointed agent of Pope & Talbot, or Seattle Stevedore Co., receive, at ship's side at said Olympic Steamship Co.'s dock at Pier 48, and to stow in the warehouse on, and in railroad [534] cars on spur tracks at, said dock, the cargo of the P & T Adventurer, upon compensation for work done before the cargo comes to rest where stowed on the dock or loaded on railroad cars payable by Pope & Talbot to said Olympic Steamship Co.

VI.

'That in pursuance of its aforesaid handling of the said ship's cargo, Olympic Steamship Co., Inc., employed the plaintiff, Jack V. Cordray, as a foreman over other shoreside workmen, employed by it handling said cargo on its said Pier 48.

VII.

That at all times pertinent herein, plaintiff was so employed.

VIII.

That plaintiff has elected to recover damages against a third person, other than his employer, and that third person is the defendant, which action as to suing a third person is permitted under the

law under the circumstances which are involved here, and all of the required conditions to be performed by the plaintiff in making such election as the law provides have been faithfully and fully performed by the plaintiff.

IX.

That the plaintiff, Jack V. Cordray, was [535] injured while on the deck of the S.S. P & T Adventurer, in the vicinity of No. 2 hatch during the early morning of July 15, 1956.

X.

That following the accident, the plaintiff was hospitalized and has undergone medical treatment and has incurred expense for hospitals and doctors; that prior to the accident which occurred on July 15, 1956, he had been involved in another industrial accident causing injury to his back for which he underwent surgery by Dr. D. G. Leavitt for repair of a herniated, which means ruptured, disc in the region of the lower back.

XI.

That the S.S. P & T Adventurer was in navigable waters within the Western District of Washington at the time of the occurrences alleged in this action, and this Court has jurisdiction of the subject matter and the parties to the action.

The foregoing facts are agreed to by the parties, but each party expressly reserves the right to present at this trial of the plaintiff's action against

the defendant, evidence on said facts and other pertinent or subsidiary facts during this trial in this Court before this Court and jury. [536]

In addition to those admitted facts, the pleadings of the parties,—that is, the plaintiff and the defendant,—in effect set forth the following further contentions and issues in this case:

The plaintiff alleges in his complaint that on or about the 15th day of July, 1956, at about the hour of 4:45 o'clock a.m., the plaintiff while in the course of his employment and in the carrying out of the duties of his said employment was obliged to traverse the weather-deck of said vessel, the P & T Adventurer, while it was moored in the navigable waters of the Port of Seattle, alongside Pier 48 in said harbor; that while plaintiff was in the vicinity of the No. 2 hatch on said deck, the pennant or strap on the gantline block on the starboard boom of said No. 2 hatch suddenly parted and caused said pennant and gantline block to fall and violently strike and injure the plaintiff.

In its answer, the defendant admits that plaintiff was injured on or about the date and time mentioned when a gantline block of said vessel struck and injured plaintiff, but except as so admitted the defendant does deny each and every other allegation, matter and thing contained in this part of plaintiff's complaint.

The plaintiff also alleges in his amended [537] complaint that the proximate cause of plaintiff's injuries and damages were the unseaworthiness of said vessel with respect to said pennant and gant-

line block, the negligence of the officers and personnel aboard said vessel, and the breach of defendant's nondelegable duty to safeguard plaintiff as a business guest and invitee aboard said vessel from injury by negligent acts, all of which unseaworthiness and negligence and such alleged status of plaintiff the defendant denies.

The plaintiff further alleges that as a proximate result of the unseaworthiness of said vessel and said negligence, plaintiff was struck with great force and violence and sustained severe and permanent injuries to his head and neck; that he sustained a severe nervous shock, pain and mental suffering; that plaintiff has been obliged to incur liability by reason of said injuries for hospitalization, medical care and treatment; that plaintiff has lost wages, and will continue to lose wages for a long time to come solely by reason of said injuries; that by reason of the foregoing, plaintiff alleges he has been damaged in the sum of \$75,000.00, for which sum plaintiff prays for judgment against the defendant together with his costs and disbursements herein to be taxed by the Court and not by the jury. That is, in that respect costs [538] are referred to, not the total overall aggregate recovery. The jury fixes, if it awards a verdict to the plaintiff, the amount of his recovery in the general relief and in the special relief mentioned except the taxable costs, which taxable costs are always in every instance determined, fixed and entered by the Court without the jury's help on that particular detail.

For further answer and by way of a first affirmative defense the defendant alleges in substance and effect as follows:

That if plaintiff was injured and/or damaged as alleged in plaintiff's complaint and amended complaint, all of said injuries and/or damages were proximately caused and contributed to by the negligence of the plaintiff himself by voluntarily placing himself or remaining in a dangerous position, in failing or omitting to take reasonable precautions for his own safety, and, having fully answered plaintiff's complaint, the defendant prays that the complaint be dismissed with prejudice and that defendant have and recover its costs and disbursements herein to be taxed by the Court and not by the jury.

This is a civil case and the party alleging in his pleadings any material fact which is not admitted by the opposing party has the burden of proof to establish [539] such fact, which must be done by a preponderance of the evidence.

The basis of this action is unseaworthiness and negligence. The plaintiff is not entitled to recover merely because there was an accident. In order to recover, the plaintiff must prove by a preponderance of the evidence that the vessel was unseaworthy as alleged or that the defendant was negligent in one or more particulars, as alleged in plaintiff's complaint, and that he sustained injuries and damages as alleged and that such unseaworthiness or negligence was the proximate cause of such injuries and damages.

Negligence is the failure to exercise reasonable and ordinary care. By the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances and conditions. Negligence consists in the doing of some act which a reasonably prudent person would not do under the same or similar circumstances, or in the failure to do something which a reasonable prudent person would have done under the same or similar circumstances and conditions. Negligence is not to be presumed, but must be established by proof the same as any other fact in the case.

The term "proximate cause" means an [540] efficient cause of an injury or loss without which such injury or loss would not have been sustained. It is that cause which in direct, unbroken sequence produces or directly contributes to producing the injury or loss complained of, and without which cause the injury or loss would not have occurred.

By the term "burden of proof" is meant the obligation to prove or establish a fact by a preponderance of the evidence.

By the term "preponderance of the evidence" or "fair preponderance of the evidence" is meant that evidence on a particular matter which, when fully, fairly and impartially considered by you, has the greater weight with you, produces a stronger impression and is more convincing to you as to its truth than that to which it is opposed; and such preponderance of the evidence is not necessarily determined by the greater number of witnesses who

may have testified for the one party or the other regarding such matter, since you may take into consideration all of the evidence in the case, no matter by which side produced.

Unseaworthiness, as used in this case and throughout the evidence and throughout this Court's instructions, exists whenever the vessel itself or its cargo, appliances, appurtenances or equipment are not [541] reasonably safe and adequate for the purposes reasonably intended.

In its answer the defendant charges that the plaintiff was guilty of contributory negligence. "Contributory negligence" means negligence or want of care on the part of the person suffering injury or damage which materially and proximately contributed to cause the injuries complained of. It also may consist in doing some act which a reasonably prudent person would not have done under the same or similar circumstances or conditions, or in failing to do something which a reasonably prudent person would have done under the same or similar circumstances. It is never presumed, but must be established by proof when, as in this case, it is denied. The burden of such proof as to contributory negligence in this case is on the defendant.

By the admiralty law, which relates to ocean shipping activities and incidents connected therewith, the owner of a vessel is liable to indemnify a cargo unloading longshoreman and his foreman for injuries and damages proximately caused by the unseaworthiness of the vessel or its appurtenant ap-

pliances and equipment. It is immaterial whether the shipowner knows of the dangerous and unseaworthy condition, because the shipowner owes the longshoreman a continuous duty to provide [542] him a safe place in which to work. This duty cannot be delegated to anyone else.

Under the admiralty law, which applies in this case, a longshoreman or his foreman assigned in unloading cargo from a ship does not assume the risk of an unsafe, improper and unseaworthy place to work. The shipowner is under a continuing, non-delegable duty to keep the ship and its appliances seaworthy, safe and in proper condition.

Recovery on the ground of unseaworthiness is limited to seamen and others such as longshoremen performing work for the ship such as discharging cargo which historically and until recent times was done by members of the ship's crew.

It was the duty of the defendant under its shipping contract with shippers to unload their cargo from the ship and store it on the floor within the warehouse on the dock. To perform that duty, defendant made cargo discharge arrangements resulting in two independent contractors using their employees in such cargo work. One of such contractors, Seattle Stevedore Co., through its employees unloaded the cargo from ship's hold onto the outside dock platform under ship's tackle, and the other such contractor, Olympic Steamship Co., moved the cargo onward from that place to a [543] place of rest on the dock floor inside the dock warehouse.

The employees of each of such contractors in their work had the right to use defendant's unloading gear and equipment and to go upon such places under defendant's control as were reasonably necessary in the performance by such contractors' employees of their work of discharging said cargo from vessel hold to point of rest on the dock floor within the dock warehouse.

In order for the plaintiff to recover, you must in any event find from a preponderance of the evidence that the plaintiff was at the time of the accident in a place aboard the vessel where it was reasonably necessary for him to be in the performance of his duties as foreman of the dock-working longshoremen assisting on the dock in the discharge of the vessel's cargo.

If you do not so find, plaintiff would be in a status similar to that of a person without any employment connection with the unloading work at hand, and in that event plaintiff would not be entitled to recover in this case.

Under the law the mere fact that the plaintiff in this case has sued the defendant is not to be taken by you as any evidence whatsoever of plaintiff's right to recover from the defendant. You cannot find for the [544] plaintiff in this case from the mere fact that you find he had an accident or received an injury while on board the vessel, nor does it raise any inference that the vessel was in any respect unseaworthy or that the defendant was negligent.

While the party alleging any fact not admitted by the opposite party has the burden of establishing such fact by a preponderance of the evidence, it is not essential that it be established by evidence introduced by the party having such burden of proof, but it may be established in whole or in part by evidence introduced by the opposite party.

As to plaintiff's allegations of unseaworthiness of the vessel, you are instructed that a vessel is seaworthy when, respecting the vessel itself, its appliances, appurtenances, cargo and cargo storage, it is reasonably fit for the voyage and the work for which the vessel is to be applied.

The standard of seaworthiness is not perfection, but reasonable fitness.

A vessel is unseaworthy when any of its integral appurtenances, appliances or equipment are not reasonably safe for the uses which the vessel's owner should reasonably expect will be made of such appurtenances and appliances. [545]

Seaworthiness is a question of fact only and it is not dependant upon a showing of negligence on the part of the vessel owner. Where an integral portion of a vessel, its appliances, appurtenances and equipment is insufficient for its intended use and such use proximately results in injury, the owner is liable for such injury even though the defect rendering the appliance unseaworthy and insufficient was a latent defect.

If you find that the P & T Adventurer was unseaworthy before and at the time of the accident and that the plaintiff was injured or damaged as

a proximate result thereof, then I instruct you that in order for plaintiff to recover it is not necessary that he prove that the shipowner or operator had notice or knowledge of such unseaworthy condition or the means of obtaining it.

Upon consideration of all the evidence in this case, if it remains doubtful in your minds whether the injuries complained of resulted from the specific unseaworthiness as charged by plaintiff against the defendant, or from some other cause, then the plaintiff cannot recover for unseaworthiness.

The burden is on plaintiff to prove by a fair preponderance of the evidence that the defendant's ship [546] P & T Adventurer was unseaworthy as alleged and that as a proximate result of such unseaworthiness plaintiff sustained damages as alleged in his complaint.

Respecting negligence, the burden is upon the plaintiff in this case to establish by a fair preponderance of the evidence two things: (1) that such defendant Pope & Talbot Co., Inc., was negligent in one or more of the particulars as alleged in the plaintiff's complaint; and (2) that such defendant's negligence, if any, was the proximate cause of any injury or damage, if any, which such plaintiff may have sustained. Should the plaintiff satisfy you by a fair preponderance of the evidence on these two points, he is entitled to recover against the defendant. If he does not so satisfy you, he is not entitled to recover for negligence.

In order that a plaintiff may recover for personal injuries and damages for negligence in an

action such as this it is not necessary that he shall have proven each and all of the specifications of negligence which he alleges. It is sufficient if he has proven one alleged material specification of negligence on the part of the defendant, its agents or employees, and if you find from a preponderance of the evidence that such negligence proximately caused the accident and injuries complained of by plaintiff. [547]

As to negligence, you are instructed that a shipowner is not bound to furnish the very latest or most improved working conditions and appliances, but if the shipowner furnishes such working conditions and appliances as are reasonably safe and suitable and uses reasonable care in maintaining them in a safe condition, thereby the shipowner discharges that duty under the law.

As to liability for negligence, a shipowner is not an insurer of the safety of longshoremen and seamen employed on its vessels, and as to negligence liability the law recognizes that absolute safety is unattainable and that in carrying on ordinary work there is no such thing as absolute safety. In connection with such negligence liability, shipowners are liable only for the result of their negligence, and they are not liable for the normal risks or dangers necessarily connected with the services or employment.

You are instructed that a shipowner is not bound to furnish the very latest or most improved working conditions and appliances, but if the shipowner furnishes such working conditions and appliances

as are reasonably safe and suitable and uses reasonable care in maintaining them, thereby he discharges his duty in that respect.

The duty of abstaining from causing injury to another through unseaworthiness or negligence applies [548] where the one injured has a previously existing bodily injury, disease, infirmity or abnormality, and when this duty is violated, damages proximately resulting therefrom may be awarded for the injury done even though the extent of the injury might not have resulted but for the previously existing physical condition of the person injured, or even though the injury sustained was only an aggravation of the pre-existing condition.

There can be no recovery by plaintiff for the effects of his pre-existing condition which are not the direct and proximate result of the defendant's alleged negligence or said unseaworthiness. Plaintiff, if you find that he is entitled to recover, can only recover for such injuries, if any, as were directly and proximately caused by the accident here in question.

The defendant corporation can act only through its agents and employees and is responsible for the acts and omissions of such agents and employees within the scope of their authority.

The negligence, if any, of the defendant's employees other than the plaintiff is to be considered by you as the negligence of the defendant.

You are instructed that a plaintiff may not cast the burden of his own protection upon another. He owes this duty to himself. The law does not permit

him [549] to close his eyes to risk or danger and then, if he is injured as the result of such risk or danger, to be excused from the consequences of his own act or omission. He must use his own intelligence and faculties for his own protection.

The law requires a person claiming damages as compensation for injury to do everything possible to mitigate that injury and the resultant damage. To mitigate means to lessen or make less severe.

Therefore, even if you find for the plaintiff and find that he has suffered some damage for which you find the defendant liable, in arriving at the amount of your verdict you should consider whether the plaintiff has done those things which a reasonable and prudent man would do under the same or similar circumstances to either lessen the injury or avoid aggravation of it.

If you find the plaintiff has not acted reasonably and prudently in mitigating his injury, you shall decrease your verdict, if any you award him, to an amount which would compensate him only for what his injuries would be if he had acted prudently.

The measure of damages for impairment of earning capacity is the difference between the amount plaintiff was capable of earning before his injury and that which he is capable of earning thereafter.

In an action for damages and lost wages, a person if able to work must take reasonable steps to obtain and perform some kind of available and suitable re-employment.

It is the duty of the Court to instruct you as to the measure of damages in case you find a verdict

for the plaintiff. By the giving of this instruction the Court does not mean to suggest to you what your verdict should be or for which party it should be rendered.

If your verdict is in favor of the plaintiff, then you will from a preponderance of the evidence assess the amount of his recovery, and you should in that event allow such sum as so shown will fairly and justly compensate plaintiff for the damages, if any, sustained arising out of the accident and proximately caused by the negligence of the defendant and/or the unseaworthiness of its vessel. You should take into consideration the nature, character and extent of plaintiff's injury, if any you so find, the pain and suffering, if any, you so find he had endured or will endure in the future, together with any permanent disability, if any, which you find has been established by a preponderance of the evidence.

Your award should include compensation for such medical and hospital expenses, if any, as you so find [551] have been reasonably and necessarily incurred by plaintiff in the past and any such expense, if any, which you so find will with reasonable certainty be so required in the future. You should likewise consider any loss of earnings by plaintiff sustained and any impairment, if any, of his earning ability which you so find is established by the evidence.

You should not indulge in speculation or conjecture, but may award compensation only for such

injuries and damages as are shown by a fair preponderance of the evidence to have been sustained or are reasonably certain to be sustained in the future.

The law has not furnished us with any fixed standards by which to measure pain, suffering or disability. With reference to these matters, you must be governed by your own experience and judgment based upon the evidence in this case and in the light of the Court's instructions.

As I have already instructed you, the defendant has pleaded that if the plaintiff was injured, his injuries were caused and contributed to by his own careless and negligent acts. As already in greater detail stated in these instructions, contributory negligence is defined in law as negligence on the part of the plaintiff which contributed directly or proximately to his own [552] injury or damage. In some cases contributory negligence on the plaintiff's part defeats his recovery entirely without regard to the question whether such negligence was greater or less in degree than the negligence of the defendant. This case, however, is governed by the maritime law, under which the fact that the injured party may have been guilty of contributory negligence does not bar a recovery unless, respecting liability for negligence, the injuries were caused solely by plaintiff's own or a third party's negligence. When his own negligence merely concurs with that of the defendant, it merely operates to diminish the amount of his recovery in proportion to the extent

to which his own negligence contributed to his injury.

Applying these rules to this case, if you find that the plaintiff's injuries or damage, if any, were caused solely by his own negligence, then your verdict will be for the defendant. If you find that plaintiff's injuries or damages, if any, were caused solely by said unseaworthiness of the vessel or solely by the negligence of the defendant, then your verdict will be for the plaintiff, provided you find under all these instructions that plaintiff is entitled to recover, and in that event you will assess his damages at the full amount which you may find is necessary to compensate him for his injuries [553] or damage, as I have already instructed you upon that subject.

If you find that plaintiff was injured solely by a third party and not by said ship's unseaworthiness or defendant's negligence, then your verdict shall be for the defendant. If, however, you find that both the plaintiff and the defendant were negligent, or that said unseaworthiness existed as alleged and that the negligence of both the plaintiff and the defendant respecting such negligence liability contributed to cause the plaintiff's injuries, or such unseaworthiness of the vessel caused such injuries and/or damages, then your verdict will still be for the plaintiff and against the defendant, but in assessing plaintiff's damages you will diminish the amount awarded him in the proportion in which you find that his own negligence contributed to his injuries or damage, if any.

The fact that the Court has instructed you upon the rules governing the measure of damages in this case is not to be taken by you as an indication on the part of the Court that it believes or does not believe that the plaintiff is or is not entitled to recover damages. Such instruction is given to you to guide you in arriving at the amount of your verdict only in the event that you find from the evidence and under these [554] instructions given you by the Court that the plaintiff is entitled to recover damages. If from the evidence and under the instructions given you by the Court you find that the plaintiff is not entitled to recover, then you are to entirely disregard these instructions which have been given you concerning the measure of damages.

The rules of evidence ordinarily do not permit the opinion of a witness to be received in evidence. An exception to those rules exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science, profession or occupation, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You will consider such expert opinion as may have been given in this case and you should weigh the reasons, if any, given for it. You are not bound, however, by any such expert witness opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it if in your judgment the reasons given for it are unsound.

You are the sole and exclusive judges of the evi-

dence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right [555] to consider his demeanor upon the witness stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstance arising from the evidence which appeals to your judgment as in any wise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except in so far as the same may be corroborated by other credible evidence in the case.

The plaintiff having testified as a witness, the foregoing relating to credibility of witnesses and weight of testimony applies to him and his testimony, as well as to all the other witnesses in the case.

It is the duty of the Court to instruct you as to the law governing the case, and you must take such instructions to be the law. You will consider such [556] instructions as a whole and will not select any one of them and place undue emphasis on that

one instruction. If the Court has repeated or emphasized more than another any instruction in whole or in part or has seemed to the jury to have done so, you will disregard as unintended and without effect any such repetition or emphasis by the Court.

You will consider all evidence admitted by the Court and now before you, and you will disregard all evidence and exhibits offered but not admitted by the Court, and all evidence stricken by the Court, and further you will consider only in the manner limited any evidence which was received for a limited purpose, in accordance with the statement of Counsel and the Court at the time of its admission when statements were made regarding such limitations upon the purpose and scope of the evidence so admitted.

In this connection you are instructed that you are not called upon to pass upon objections and exceptions made or taken by Counsel, and you should not allow the making of objections and the taking of exceptions by Counsel to influence or confuse you.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide [557] the issues upon the merits and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of the other, and without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

Statements, if any, by Counsel or the Court, un-

supported by your own recollection of the evidence, you will disregard.

You shall not permit sympathy or prejudice in favor of or against either party or their respective attorneys to have any place in your deliberations, for all persons are equal before the law and all are entitled to exact justice.

While it would be proper for me as the trial judge to analyze the testimony and to give you my understanding of it, which, however, would not be binding upon you, my purpose is not to intimate to you any opinion I may have of any fact or the weight of any evidence, and if I refer or have referred to any facts in the case, it will not be and has not been for the purpose of indicating to the jury any opinion I may have of the facts, but simply to illustrate some proposition of law which is involved with the facts.

After you retire to the jury room to consider your verdict, if you can conscientiously do so, you are [558] expected to agree upon a verdict in this case. The matter being submitted to you for your consideration is an important and serious one, as are all cases submitted to juries. You should bring to your consideration of this case your earnest and honest endeavor to solve it justly and properly with due regard to the rights of both the plaintiff and the defendant.

Let me say to you that after you retire to the jury room to consider your verdict you should then freely consult with one another regarding the views on the evidence of each and all of you. If any one

of you should be convinced that your view of the case is erroneous, do not be stubborn, and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper to adhere to your own view, if after a full exchange of ideas with your fellow jurors, you still believe you are right.

You are not permitted to resort to lot or chance in determining your verdict, nor are you permitted to use the so-called pooling or quotient plan or scheme. Such scheme is for each juror to write down the amount he thinks should be awarded, then to add up those amounts and divide that sum by twelve and thus fix the amount of your verdict, in case it is for the plaintiff. Do not do that, as that would be illegal and would not be a valid [559] verdict, for your verdict should be based upon the evidence and the law as given to you by the Court, and not upon such or any chance or scheme.

I might add this further thought to the jurors, by way of an explanation of the present status of this case, or the trial of it. Counsel in the case have worked industriously and earnestly to bring before the Court and jury the evidence in the case. The Court has fully instructed the jury on the law applicable to it. It is not known to the trial judge what more could be done to properly enable this jury to perform its duty.

You now have all of the means necessary to a decision of this case. In this court the instructions in written form are not sent to the jury room. Also written transcripts of the testimony orally stated

from the witness stand are not sent to the jury room and will not be in this case. It is for the jury to remember the evidence and the Court's instructions.

Immediately upon your retiring to the jury room to consider your verdict you will select one of your number as your foreman, who will speak for you in court and announce your verdict.

The pleadings in the case and the orders and other files will not be sent to the jury room, as the issues in this case are simple and have been sufficiently [560] explained in the statements at the outset of the trial by Counsel and by the evidence which is now all in before the Court and jury and in the thorough arguments of Counsel.

You will take with you to the jury room the admitted exhibits in the case, and you will be given for your use in the jury room two forms of verdict. One of such forms is in case you find for the plaintiff. The other of such forms is for your use in case you find for the defendant. Both of the forms have been prepared by the Clerk of this court for the convenience of the jury and are in the usual form which other juries have used in similar situations so far as the form is concerned. It remains, however, for you to complete the form by the necessary insertion of needed words and figures in some cases, upon the condition that you find for the plaintiff in particular, and in this case either verdict form by your proper use of it and proper filling in of the particular form desired by you in order to express the jury's verdict, whatever it is, is intended for and is sufficient to meet any eventuality which may

arise in this specific case, and when the blank spaces intended to be filled in are properly filled in, no matter which verdict you use, if it is the verdict form which you intend by filling in the blanks clearly indicated to be filled in the verdict [561] will become the true and lawful verdict when signed by the foreman and so filled in in this particular case.

When you reach your verdict, if the same is for the plaintiff, you will in that event fill in the amount of recovery you allow plaintiff and have your foreman sign that verdict. There are two blank spaces in that plaintiff's form of verdict which you will have to fill in so far as expressing the amount of the verdict is concerned if the plaintiff's form of verdict is to be used by the jury to express its verdict found by them. The long blank line is for the use of the written words which are needed to express in words the amount of the verdict. The shorter blank line beneath that one is for the purpose of filling in there only figures, Arabic figures, which in figures express the same amount of the verdict. So that there will be as a result of the proper use of this verdict form two different kinds of expression of the same thing; namely, the amount of the verdict, and one of those expressions will be in written words and the other expression will be in Arabic figures such as we use, both meaning the same thing as to the amount of recovery, if any recovery is allowed.

If you find a verdict for the defendant, you will in that event use the appropriate form provided

therefor, which is quite obvious and clearly stated, and [562] have your foreman sign that verdict form.

You will discard the form of verdict not used by you.

It is necessary that all twelve of you agree upon your verdict, for the verdict of any lesser number of you than the unanimous verdict of all twelve of you is not a legal verdict in this, the United States District Court. Your verdict must be, if it is a lawful verdict, and no matter for which litigant it is, a unanimous verdict of each one and all twelve of you.

Counsel, have I overlooked any clerical or similar matter? (No response.)

As provided by law and the usual practice in cases like this, if there are any exceptions to be noted by Counsel to the giving of any instructions or the failure to give any requested instructions, I shall, upon being so notified, temporarily excuse the jury for that purpose.

Does the plaintiff have any such exceptions?

Mr. Poth: No, your Honor.

The Court: Does the defendant have any such exceptions?

Mr. Howard: Yes, your Honor.

The Court: As I have just stated, this is another procedure which must under the law be taken in [563] the absence of the jury. It is a usual one, and there is nothing extraordinary or unusual about it. The case is not yet submitted to you for your consideration or verdict, so please defer your discussion

of the case. It will be later finally submitted for the purpose of deliberation. The jury will temporarily retire.

(The following proceedings were had in the absence of the jury:)

The Court: Does the plaintiff have any exceptions?

Mr. Poth: I have none, your Honor.

The Court: Does the defendant have any exceptions? If so, he may proceed to do so at this time.

Mr. Howard: Comes now the defendant at the close of all the evidence, after argument and after the instructions have been read to the jury but before submission of the case to the jury, pursuant to applicable rules, and notes the following objections to instructions as given by the Court or the failure to give certain instructions hereinafter mentioned.

I don't have a copy of the instructions given by the Court, so I will be unable to refer to them by number. I will, however, undertake to identify them in the order in which they were given.

Defendant objects to the language used by the [564] Court in the instruction dealing with the admiralty law on unseaworthiness, which was based, if the Court please, on Plaintiff's Instruction No. 2.

The particular language which the defendant objects to is the use of the phrase "cargo unloading longshoreman and his foreman". The defendant submits now, as it has earlier in conference, that that is a factual issue as to the status of the plaintiff which should be left to the jury and should not be expressed in those terms by the Court. It should, on

the contrary, in defendant's opinion, be expressed in the terms of the law in an instruction such as was proposed by defendant, Instruction No. 15. In the same——

The Court: Have you finished that?

Mr. Howard, Yes, your Honor.

The Court: Allowed.

Mr. Howard: I believe as part of the same instruction or immediately following it, this was in the instruction in which the Court furnished Counsel with a draft earlier today, defendant—this is the instruction dealing with the duty of the defendant under its shipping contract with shippers. Defendant objects to the instruction in its entirety and to the fact that the instruction constitutes an unnecessary and unjustified comment by the Court on this particular aspect of the [565] case, the Court not having otherwise commented upon the facts and the evidence in the case.

In the same instruction defendant objects to the——

The Court: The exception is allowed.

Mr. Howard: The defendant objects to the second paragraph, the sentence beginning "One of such contractors, Seattle Stevedore Company," and also referring to Olympic Steamship Company, as being a statement by the Court which is upon an issue of fact that should have been retained for the jury's determination.

The Court: Allowed.

Mr. Howard: As to the next paragraph of the same instruction, which is the paragraph beginning

“The employees of each of said contractors,” defendant objects to that portion of the instruction on the basis that the Olympic Steamship Company was not, under any of the facts or the evidence in this case, entitled to use any of the unloading gear or equipment of the defendant Steamship Company. It is objected to on the basis of being an improper comment upon the evidence on a matter within the province of the jury and also on the ground that it is an inaccurate statement of the fact.

The Court: Is that all you have to say there?

Mr. Howard: On that one, yes, your Honor.

The Court: On that point does opposing Counsel wish to have any correction made, or are you satisfied with it?

Mr. Poth: I wonder if that could be read now just again.

The Court: Do you not have a copy of this?

Mr. Poth: Well, no. It's one that your Honor composed. Do you have a copy, your Honor?

Mr. Howard: Your Honor gave Counsel a copy of it.

Mr. Poth: I don't believe I was given a copy of that one.

Mr. Howard: I've got it here. (Handing paper to Mr. Poth.)

Mr. Poth: That says, your Honor,—here's the language: “The employees of each of such contractors in their work had the right to use defendant's unloading gear and equipment and to go upon such places under defendant's control as were reasonably

necessary in the performance by such contractors' employees of their work—". I don't see any necessity to instruct the jury because they do use the ship's gear lots of times to move cars and——

The Court: If you join in asking——

Mr. Poth: I don't join. [567]

The Court: Pardon?

Mr. Poth: From my knowledge of the work I can't see any necessity for instructing the jury.

The Court: If you think that in this case, not from your knowledge, there is any question about the undisputed evidence indicating any consent by the shipowner——

Mr. Poth: No, I don't see it.

The Court: ——that the dock workers may use unloading gear and equipment——

Mr. Poth: As is reasonably necessary, that's right. As long as that "reasonably necessary" is in there I see no objection to it.

The Court: It is a question of what the undisputed evidence in this case may show.

Mr. Poth: Well, it shows that they moved cars, that they took stuff from the hooks and made use of the gear of the ship in landing their loads and getting them on the bulls, and all that sort of stuff. As far as I'm concerned——

The Court: Does the evidence show that any of this material was on pallets which went on board the bull lifts?

Mr. Poth: That's right.

The Court: And went into the shed? [568]

Mr. Poth: Yes.

Mr. Howard: I submit, your Honor, that there is absolutely no evidence in this case that the employees of Olympic Steamship Company operating the dock had any right to use any of the unloading gear and equipment of the steamship or of the defendant Pope & Talbot, and if your Honor will recall I asked witness after witness one right after the other, "Did Mr. Cordray, the dock foreman, have anything to do with the manipulation of the cargo handling gear of the ship or the winging in of the booms?" and categorically right down the line they said no.

The Court: I am inclined to correct that part of the instruction which has these words in it, after the word "right" in the second line in this paragraph, I am considering correcting the instruction by eliminating the words "to use defendant's unloading gear and equipment and", leaving "to go upon such places under defendant's control as were reasonably necessary in the performance by such contractors' employees of their work of discharging—".

Mr. Howard: We further object to that same paragraph on the grounds that it is an unnecessary comment by the Court on the evidence and an unnecessary direction by the Court on a factual issue as to whether or not employees of the Olympic Steamship Company such [569] as the plaintiff had the right to go on the ship, which we submit in behalf of the defendant is an issue which should be left to the consideration of the jury and not determined by the Court in these instructions.

Defendant further excepts——

The Court: Now just a minute. Have you finished with that one?

Mr. Howard: Yes.

The Court: Is there anything finally——

Mr. Poth: No, I think your Honor has submitted the question to the jury as to whether he had a right to go aboard the vessel on this particular occasion.

The Court: Mr. Howard, do you remember that any witness said that the use of all of ship's gear stopped when the materials were landed, or was there evidence that some of the loads were higher lifting lifts used some of the loads that were left on the dock with the gear that they had?

Mr. Howard: I don't recall any such evidence, your Honor. As a matter of fact, the evidence was that there were two sling men employed by Seattle Stevedore Company who were stationed on the dock to do all that was necessary in connection with disconnecting the cargo handling gear of the ship from the loads of cargo after they were landed on the dock. [570]

Mr. Poth: Well, in the third paragraph I have no objection to striking out "defendant's unloading gear".

Mr. Howard: "and equipment"?

Mr. Poth: "unloading gear and equipment" and leave it "the right to go——"

The Court: I am going to strike that out.

Mr. Poth: But as to the other, I think it's per-

fectly correct and I think that we spent a lot of time on this instruction this morning.

Mr. Howard: I just want to record my objection, your Honor.

The Court: That is all that is necessary. You have that right.

Mr. Howard: Shall I proceed to the next paragraph?

The Court: The Court will correct that instruction as to the employees using "defendant's unloading gear and equipment and" by giving the instruction without that, striking those words. Do you wish the record to show that you except again to the Court's doing that or giving the instruction in its corrected form?

Mr. Howard: I don't object to the——

The Court: I mean to say do you except to the Court's giving what the Court has told you will be the [571] corrected form after striking from the form now given already to the jury these words: "to use defendant's unloading gear and equipment and"? Do you wish——

Mr. Howard: That overcomes one of the objections I have expressed to that paragraph, but the other one which I had previously expressed is still not corrected.

The Court: You do not get the point. Do you wish the record now to show the exception to the instruction in its final form as so corrected?

Mr. Howard: Yes.

The Court: Without the necessity, after the corrected form is given and the striking is done before

the jury, that we shall then thereafter again have to excuse the jury for you to——

Mr. Howard: No, I'm willing that the record so show as the Court stated.

The Court: Very well. I advise Counsel that I intend to strike the words from that part of the instruction that we are now referring to, which words are now "to use defendant's unloading gear and equipment and", and to ask the jury to disregard them and to instruct them to do so, and to restate to them the instruction as amended without those words, and to the giving of which instruction Counsel excepts now with like effect as if he did it after it was given and the jury again was [572] excused from the jury box for that purpose and the Court had then allowed the exception. The Court now allows the exception with like effect as if it were then made, because it now is made with the understanding between Counsel and the Court it will have the effect as if made after the striking and correction.

Mr. Howard: Thank you, your Honor. Proceeding to the next paragraph of the same instruction,——

The Court: You may do so.

Mr. Howard: The paragraph beginning, "In order for the plaintiff to recover," defendant objects to the term used by the Court in that instruction "dock-working longshoremen" on the ground and for the reason that defendant submits that that is a factual issue as to the status of the plaintiff as a dock foreman which should be left to the determina-

tion of the jury and should not be so defined in the instruction as to be a direction on that particular factual issue.

The Court: The Court wishes the record to contain this comment from the Court as the reason why that was given: The Court does not regard it as a comment on the evidence, any of this. The Court is stating the legal status of the plaintiff and his fellow employees as the Court understands it by virtue of the record on the evidence which is wholly undisputed. There [573] is no dispute from any party about any fact which is involved in the Court's considering this as stated, the legal status of the employees in question, and that is true as to all of these things which Counsel has been stating before this relating to this general subject in connection with which he has excepted on the grounds stated by him that the Court was commenting on the evidence. The Court does not believe it was commenting on the evidence. It did not intend to do so. It was merely stating the legal status of the persons referred to by virtue of the record in this case which is undisputed. There is no dispute about it at all. You may proceed.

Mr. Howard: May that objection be noted on the record?

The Court: That exception is noted and allowed.

Mr. Howard: Defendant further objects to this entire instruction on the ground that it is not tied in with the issue of unseaworthiness as proposed by defendant's Counsel in the course of instruction conferences.

Mr. Poth: Let the record show, your Honor, that I except to any exceptions made in my behalf by Counsel for the defendant.

Mr. Howard: Did I misstate myself as plaintiff's——

The Court: I do not remember what it was.

Mr. Howard: I didn't mean to. May I have that read back, your Honor? I want to have it straight.

The Court: You may.

(The reporter read Mr. Howard's statement beginning Line 17, Page 574.)

Mr. Poth: I'm sorry.

Mr. Howard: Following this particular instruction——

The Court: Was there any correction to be made?

Mr. Howard: No, that's all I have on that.

The Court: You may proceed.

Mr. Howard: Following this instruction the Court gave additional instructions on the definition and use of the term "seaworthiness" or "unseaworthiness".

The Court: Before you get to that and in connection with your exceptions on this other matter, did I understand that you were leaving that subject now?

Mr. Howard: I'm still on seaworthiness or unseaworthiness, your Honor.

The Court: I am thinking about this particular part of the instruction material.

Mr. Howard: I meant to pass now from that in-

struction that your Honor gave us a copy of in chambers.

The Court: I wish before you do that for the record to show that in that connection the Court offered [575] and the Court still offers, unless Counsel objects now as Counsel did when we were informally discussing the matter, to instruct the jury as follows:

“If you find that it was not reasonably necessary for plaintiff in order to properly carry out his work assignment with those working on the dock, or if plaintiff at the time and place of the accident had in fact no business or duty connected with any of the unloading work and was at the place of the accident for some purpose other than his work assignment on the dock, then the defendant would not be liable in this case.”

The Court is still willing to give that instruction unless defendant's Counsel or plaintiff's Counsel objects, and they do not have to make any response. I will have to, however, have a response in case it is desired that the instruction be given.

Mr. Howard: Well, if the Court please, I would like to respectfully respond to that and let the record show that I have previously objected to that portion which the Court offered to give and has now read into the record, and my objection was on the ground and for the reason that defendant does not believe that it is a proper place or is a proper statement in this case, the [576] portion, and the last part read by your Honor to the effect that defendant was at the place of the accident for some

purpose other than his work assignment on the dock, which language defendant expressly objects to.

The Court: In view of such objection the Court has not given and does not now propose to give the instruction because it concerns a field about which the Court was desirous of making more complete and exhaustive the instructions thought by the Court to be in aid of presenting defendant's theory of the case, and the Court believing it within the prerogative of defense Counsel to refuse the proffer by the Court of an instruction as to which the defendant never did make a request for it to be given by the Court.

Mr. Howard: Shall we pass on now?

The Court: You may now pass on.

Mr. Howard: Your Honor gave some instructions thereafter about seaworthiness or unseaworthiness.

The Court: A number of them.

Mr. Howard: I don't have those before me, but I would like to express an objection by the defendant to each and every one of such instructions on the ground and for the reason as to each of them that they are not tied in with the status of the plaintiff and the jury is not instructed as to the necessity of determining the status [577] of the plaintiff while aboard the ship as proposed by defendant in the last two paragraphs of Defendant's Proposed Instruction No. 4, and we object to the refusal of the Court to give those sections of Instruction No. 4 as proposed by the defendant.

The Court: Allowed.

Mr. Howard: Likewise the instructions which thereafter followed, which I'll have to refer to generally as I don't have a copy of them, pertaining to negligence and the burden of proof on the plaintiff with respect to the issue of negligence. Defendant objects to each of those instructions as given by the Court on the ground and for the reason as to each of such instructions dealing with negligence that they do not contain portions relating to the necessity of establishing the relationship of the plaintiff to the ship or to the defendant while he was aboard the ship such as were proposed by the defendant in its Instruction No. 7, Proposed Instruction No. 7, and defendant further objects to the refusal of the Court to give Instruction No. 7 as proposed.

The Court: Allowed.

Mr. Howard: Passing to the instructions on damages and relating to the determination of contributory negligence and the fixing of the amount of the verdict on contributory negligence, again I don't have the instructions [578] so I cannot refer to them by number. However, the objections of the defendant go to the failure of the Court to give defendant's Proposed Instruction No. 15 which we feel would be a more adequate statement of the rule as to mitigation of damages and would include in the instruction on damages the necessary portions relating to the determination of whether or not the plaintiff was within the class of workers entitled to recover on a warranty of seaworthiness and also, on the issue of negligence, whether the

plaintiff was within the class of workers defined as invitees to whom one duty of care was owed or was within the class of workers defined as licensees to whom another duty of care would be owed.

The Court: Allowed.

Mr. Howard: Those portions of our Instruction No. 15 were not given in the Court's instructions as to damages and we feel that therefore the Court's instructions on damages do not submit those issues at a proper time to the jury in these instructions.

The Court: Allowed.

Mr. Howard: The defendant further objects to the refusal of the Court to give our Proposed Instruction No. 1 calling for a directed verdict.

The Court: Allowed.

Mr. Howard: Defendant further objects to the [579] refusal of the Court to give defendant's Proposed Instruction No. 10 dealing with the question of whether there can be liability where the jury might find that the accident and injuries were caused solely by reason of improper use of a proper appliance by longshoremen employed by Seattle Stevedore Company. On the basis of the Freitas case in the Ninth Circuit and other cases which have been cited to your Honor in our trial brief and our memorandum on motions to dismiss we feel that we are entitled to an instruction of this nature.

The Court: Allowed.

Mr. Howard: Defendant further objects to the refusal of the Court to give defendant's Proposed Instruction No. 12 which starts in with the words "Shipowners are liable only for the results of their

negligence," and particularly to the failure of the Court to instruct on the last sentence of that paragraph as revised during instruction conference. Defendant proposed in Line 9 to insert the words "a preponderance" ahead of the words "the evidence", and defendant also indicated a willingness to strike from Line 11 the words "and stevedores". The Court nevertheless did not deem it appropriate to give that instruction. Defendant submits that that is a proper instruction under the *Freitas* case, 218 Federal 2d 562, that the negligence of a third [580] party is the issue that would be determined here and that nothing in the *Grillea* case in the Second Circuit should cause this Court to change the rule as it has been applied in the Ninth Circuit.

The Court: Allowed.

Mr. Howard: Defendant finally objects to the refusal of the Court to give special interrogatories to be answered by the jury as proposed by defendant accompanying its proposed instructions as submitted to the Court at the commencement of the trial of this case. Defendant feels that since we have here what purports to be a single cause of action grounded on either unseaworthiness or negligence, in order to preserve the record, in order to determine the basis on which the jury finds liability, if they should find liability, it is essential and imperative that we have special interrogatories.

The Court: Allowed. Is that all?

Mr. Howard: Yes, your Honor.

The Court: Bring in the jury.

(The following proceedings were had within the presence of the jury:) [581]

The Court: All of the jurors are present as before and all parties with their Counsel are present.

There was one instruction which the Court wishes to change, and in order to accomplish the change I will have to read the instruction as given. After that I intend to advise the jury of a part of it which the Court will strike. At least the Court will repeat enough of it to let you identify the instruction and then give to you the instruction which the Court wishes you to apply as correct.

The instruction in question which I desire to change is this:

“The employees of each of such contractors in their work had the right to use defendant’s unloading gear and equipment and to go upon such places under defendant’s control as were reasonably necessary in the performance of such contractors’ employees of their work of discharging the said cargo from the vessel hold to the point of rest on the floor within the dock warehouse.”

The Court now advises the jury that the words “to use defendant’s unloading gear and equipment and” are stricken from that instruction.

I direct the jury to lay my use in speaking as a part of the instruction of those words just then stated, namely, “to use defendant’s unloading gear and equipment [582] and” completely out of your minds with like effect as if you never had heard me speak them, and I wish you to consider as a part of all of the instructions the corrected instruction in

the form as it is after eliminating by such striking of those words I just specified.

I will now give to you that part of the instruction which is a part of all of the instructions for you to apply to your deliberations in this case. The corrected form of the instruction is as follows, which I wish you to so now consider as among the guides to your deliberations:

“The employees of each of such contractors in their work had the right to go upon such places under defendant’s control as were reasonably necessary in the performance by such contractors’ employees of their work of discharging said cargo from vessel hold to point of rest on the floor within the dock warehouse.”

The fact that the Court has in this manner amended the instructions and as a result of it and as a part of the process of amending has read the corrected instruction and given it to you and most of the words therein constitute a repetition of them, that mere fact of repetition and of correction shall not be regarded by you as placing or entitling you to place any more importance to the instruction as it is now given to you [583] in its corrected form than if it never had been so corrected and the Court never had so dealt with the matter in this manner. You are to consider this corrected form of instruction only as a part of all of the instructions given to you with no more emphasis or effect but with like effect as if the Court has never stated any word of it to the jury but once, and then along with it in

order with the other ones given you by the Court touching the matters and things in this case.

If there is nothing else to be said or done at this time the Court will now finally submit the case to the jury for their deliberation and verdict. Is there anything else to be said?

Mr. Howard: That's all.

Mr. Poth: Nothing, your Honor.

The Court: The bailiffs will now be sworn by the clerk.

(Thereupon, one female and one male bailiff were sworn by the clerk of the court.)

The Court: Members of the jury, the jury will now retire to the jury room to consider your verdict, being hereafter in the conduct of the bailiffs, and you will hereafter remain together at all times until discharged by the Court from further consideration of this [584] case.

Before you actually go, may I make this statement from a practical standpoint. It is not a part of the instructions, what I am now about to say, it is just merely for whatever practical consideration you wish to give it.

Ordinarily when a case is submitted at this late an hour, with reference to the noontime hour, we have found in the past that it saves the jury's time if after they go to the jury room to deliberate on their verdict they immediately do what they are supposed to do about the foreman, namely, they immediately elect their foreman in the manner the Court has already instructed you, and that thereafter you take a recess in your deliberations and

permit the bailiffs to immediately conduct you to lunch, which the Government will provide.

As to whether you do that, that is a matter for you to decide, and my speaking of it is just merely for such practical consideration as you wish to give it. It is not an instruction binding upon you. You can do without your lunch, defer your lunch as long as you wish to, if you feel that is what you want to do. That is a matter for you to decide.

I would like to add one other thing, which [585] also is not an instruction but it is just a practical consideration growing out of our experience.

The selection and election of your foreman is a very important thing. You should not vote for anyone among your number for that position of foreman merely for some consideration of sympathy or politeness or of personal courtesy. The foreman of a jury has a great responsibility. He is not supposed to control any of the jurors' votes, that is not it, but he ought to be or she ought to be a person with sufficient ability and understanding that his fellows or her fellow jurors will have the normal respect which they usually accord to people taking a responsible position of this kind. The foreman in his work may properly lead the discussions, but whether that leadership shall influence anybody's vote is not the object of such foremanship. The object of the foreman properly should be that he be a man whom all of the jurors respect both in his character and in his ability and in his general understanding and in respect to the way he reacts to his normal responsibilities in life and to the questions

which are of importance in a matter of this type. If you think the foreman would be especially qualified to lead the jury's work and deliberations and considerations in a subject of this kind, that would also be worth your consideration. [586]

All of these things which I have said were practical in nature merely for whatever consideration you wish to give them.

The jury will now retire to the jury room to deliberate upon and consider your verdict.

(Thereupon, at 12:25 o'clock p.m., Friday, November 15, 1957, the jury retired to consider its verdict.)

(At 5:00 o'clock p.m., the following proceedings were had in the absence of the jury:)

The Court: May the record show that Counsel agree that the Court may arrange for overnight accommodations at a suitable downtown Seattle hotel and may if necessary permit the men jurors to be separated or subseparated as may be required but kept together in as large groups as possible, and that of course the women jurors may occupy separate quarters from those of the men without objection on the ground that the jury was separated?

Mr. Howard: That is agreeable.

Mr. Poth: That is agreeable. [587]

The Court: Is it stipulated the Court may do that?

Mr. Howard: That's agreeable.

Mr. Poth: It's so stipulated, your Honor.

The Court: The court will be adjourned under the previous order.

(Thereupon, at 5:05 o'clock p.m., Friday, November 15, 1957, an adjournment herein was taken.) [588]

[Endorsed]: Filed January 21, 1958.

PLAINTIFF'S EXHIBIT No..3

SEATTLE TERMINALS TARIFF No. 100

* * * * *

Item No. 20

Acceptance of Tariff

Use of terminals or facilities shall be deemed an acceptance of this tariff and the terms and conditions named herein.

* * * * *

Item No. 120

Man-Hour Rates; Overtime, Standby and
Waiting Time

All of the Provisions of Seattle Terminals Tariff No. 2-D, Items 460 and 470, will apply for services performed at man-hour rates and for overtime, standby time, penalty time, and waiting time incurred in connection with terminal services and privileges performed under this tariff.

* * * * *

Item No. 380

Service Charge Defined

Except as otherwise provided in individual items, Service Charge is the charge assessed against ocean vessels, their owners, agents, or operators, which

Plaintiff's Exhibit No. 3—(Continued)

load or discharge cargo at the terminals for performing one or more of the following services: (Subject to Notes 1, 2, 3, and 4).

1. Providing terminal facilities.
2. Arranging berth for vessel.
3. Arranging terminal space for cargo.
4. Check cargo.
5. Receive cargo from shippers or connecting lines and give receipts therefor.
6. Deliver cargo to consignees or connecting lines and take receipts therefor.
7. Prepare dock manifests, loading lists, or tags covering cargo loaded aboard vessels.
8. Prepare over, short, and damage reports.
9. Order cars, barges, or lighters as requested or required by vessels.
10. Give information to shippers and consignees regarding cargo, sailing and arrival dates of vessels, etc.
11. Lighting the terminal.

Note 1: Service Charge will not apply on bulk liquids pumped through pipe lines.

Note 2: Service Charge does not include any freight handling, loading nor unloading operations, nor any labor other than that which is essential to performing the service.

Note 3: When it is required and permitted that the services of checking, receiving, and/or delivering cargo be performed by the U. S. Government,

Plaintiff's Exhibit No. 3—(Continued)

with its own personnel or with personnel in its employ and under its direction, service charge rates as named in Item 410 will apply.

Note 4: When owners, agents, or operators of vessels are permitted to perform the services of checking, receiving and/or delivering of cargo with their own personnel or with personnel directly in their employ and under their direction, service charge rates named in Item 410 will apply.

* * * * *

Column A—Rates apply on cargo loaded or discharged from or to terminals.

* * * * *

Item No. 420

Handling Defined

Handling charge is the charge made against vessels, their owners, agents, or operators for moving freight from end of ship's tackle on the wharf to first place of rest on the wharf, or from first place of rest on the wharf to within reach of ship's tackle on the wharf. It includes ordinary sorting, breaking down and stacking on wharf.

Item No. 430

Direct Loading or Discharging

(A) Direct loading or discharging is the operation of transferring freight by vessel with vessel's gear or other mechanical equipment between vessel and

1—open top railroad cars spotted alongside vessel

Plaintiff's Exhibit No. 3—(Continued)

2—water, raft, barge, lighter, or other vessel

(B) Freight loaded or discharged direct from or to open cars, as defined in Paragraph (A), will be assessed wharfage but will not be assessed handling charges by the terminal. Freight so loaded or discharged will not be checked by terminal. Checking service and any labor or equipment furnished by the terminal upon request, will be subject to charges in accordance with Items 440, 460, and 470, Seattle Terminals Tariff No. 2-D, WN.T. No. 21.

(C) Freight loaded or discharged direct from or to water, raft, barge, lighter, or other vessel, as defined in Paragraph (A), will be assessed wharfage. Freight so loaded or discharged will not be checked by terminal. Checking service and any labor or equipment furnished by the terminal upon request, will be subject to charges in accordance with Items 440, 460, and 470, Seattle Terminals Tariff No. 2-D, WN.T. No. 21.

(D) Terminals will not be responsible for overloading, improper loading, condition, or outturn of freight loaded or discharged as defined in Paragraph (A).

(E) Car blocking and dunnaging, as required, is assessed charges as per Item 700, Seattle Terminals Tariff No. 2-D, WN.T. No. 21.

* * * * *

Admitted in Evidence Nov. 12, 1957.

PLAINTIFF'S EXHIBIT No. 4
SEATTLE TERMINALS TARIFF No. 2-D

PARTICIPATING TERMINALS

Name of Participant — Location — Washington
Power of Attorney Number:

Alaska Terminal & Stevedoring Company, Seattle, Washington, 1.

Arlington Dock, Inc., Seattle, Washington, 1.

Canadian Pacific Railway Company (lines Port Arthur, Ont. and west thereof), Seattle, Washington, 2.

Griffiths & Sprague Stevedoring Co., Seattle, Washington, 2.

*** (Eliminate Luckenbach Steamship Company, Inc. Operation discontinued. Power of attorney revoked.)

Matson Terminals, Inc., Seattle, Washington, 1.
Rates, charges, rules and regulations contained in Seattle Terminals Tariff No. 2-D, WN. T. No. 21, revisions thereto or reissues thereof, apply except as to freight traffic from or to the Hawaiian Islands. Rates for such traffic handled by Matson Terminals, Inc. at Union Pacific dock will be found in Matson Terminals, Inc. Tariff No. 6-A (WN. T. No. 7) and Matson Navigation Company Tariff No. A-3 (FMB F No. 62), revisions thereto or reissues thereof.

Olympic Steamship Co., Inc., Seattle, Washington, 1.

Port of Grays Harbor, Aberdeen, Washington, 1.

Plaintiff's Exhibit No. 4—(Continued)

Port of Port Angeles, Port Angeles, Washington, 1.

Port of Seattle, Seattle, Washington, 1.

Port of Willapa Harbor, Raymond, Washington, 1.

Salmon Terminals, Seattle, Washington, 1.

* * * * *

Item No. 10

Notice to Public

This tariff is published and filed as required by law and is, therefore, notice that the rates, rules and charges apply to all traffic without specific notice, quotation or arrangement.

* * * * *

Item No. 30

Use of Terminals Deemed Acceptance

Use of wharves or facilities shall be deemed an acceptance of this tariff and the terms and conditions named herein.

* * * * *

Item No. 90

Manifests Required

Owners, agents, operators, or masters of vessels must furnish a complete copy of manifest of cargo loaded or discharged at terminal.

* * * * *

Item No. 110

Charges, Collected From Whom

All charges named in this tariff will be assessed against freight, and when not absorbed by the ocean or rail carriers, are due from the owner, shipper,

Plaintiff's Exhibit No. 4—(Continued)

or consignee of the freight. On freight moving in connection with ocean carriers, charges, (unless absorbed by rail or ocean carriers), of which the vessel, its owners or agents have been apprised, will be collected from and payment of same must be guaranteed by the vessel, its owners or agents. The use of the terminal by a vessel, its owners or agents shall be deemed an acceptance and acknowledgment of this guaranty. Owners or agents of vessels, if and when permitted to make own deliveries of freight from wharf, will be held responsible for payment of any charges against freight delivered by them and accruing to the terminal.

* * * * *

Item No. 130

Right to Refuse Freight

Right is reserved by terminal operators without responsibility for demurrage, loss or damage attaching, to refuse to accept, receive or unload or to permit vessel to discharge:

(1) Freight for which previous arrangements for space, receiving or unloading have not been made by shipper, consignee, or carrier.

(2) Freight deemed extra offensive, perishable or hazardous.

(3) Freight, the value of which may be determined as less than the probable terminal charges.

(4) Freight not packed in packages or containers suitable for standing the ordinary handling incident to its transportation. Such freight, however, may be repacked or reconditioned at discretion of

Plaintiff's Exhibit No. 4—(Continued)

terminal operator and all expense, loss or damage incident thereto shall be for account of shipper, consignee, owner, or carrier. The term "container" or "package", as used in this tariff, shall mean any suitable article or method of rendering the commodity susceptible to ordinary handling and stowing incident to its transportation.

* * * * *

Item No. 140

Right to Remove, Transfer or Warehouse Freight

Hazardous or offensive freight or freight which, by its nature, is liable to damage other freight, is subject to immediate removal either from the wharf or wharf premises or to other locations within said premises with all expense and risk of loss or damage for the account of owner, shipper or consignee.

Freight remaining on wharf or wharf premises after expiration of free time, as defined herein, and freight shut out at clearance of vessel may be piled or repiled to make space, transferred to other locations or receptacles within the wharf premises, or removed to public or private warehouses with all expense and risk of loss or damage for account of the owner, shipper, consignee, or carrier as responsibility may appear.

* * * * *

Item No. 190

Liability For Loss or Damage Limited

The terminals will not be responsible for any loss or damage caused by fire, frost, heat, dampness, leakage, the elements, evaporation, natural shrinkage, wastage or decay; animals, rats, mice or other

Plaintiff's Exhibit No. 4—(Continued)

rodents; moths, weevil or other insects; leakage or discharge from fire protection systems, collapse of buildings or structures, breakdown of plant or machinery or equipment; or by floats, logs, or piling required in breasting vessels away from wharf; nor will it be answerable for any loss, damage, or delay arising from insufficient notification, or from war, insurrection, shortage of labor, combinations, riots or strikes of any persons in its employ or in the services of others or from any consequences arising therefrom.

In performing the service of checking, the terminals will accept no responsibility for concealed damage nor for the condition of contents of packages, cases, or other containers, whether or not receipts issued so state.

* * * * *

Item No. 200

Liability For Injury

If and when others than the terminal companies are permitted to perform services on the wharves or premises of the terminal companies, they shall be liable for the injury of persons in their employ and shall also be held responsible for loss, damage, or theft by themselves or persons in their employ.

Item No. 210

Demurrage—Cars, Barges or Vessels

In furnishing the service of ordering, billing out, loading or unloading cars, or of handling to or from vessel, no responsibility for any demurrage whatso-

Plaintiff's Exhibit No. 4—(Continued)

ever on either cars or vessels will be assumed by the terminals.

Item No. 220

Delays, Waiver of Charges

Delays in loading, unloading, receiving or delivering freight arising from combinations, riots or strikes of any persons in the employ of the terminal companies or in the services of others or arising from any other cause not reasonably within the control of the terminal companies, will not entitle the owners, shippers, consignees, or carriers of the freight to waiver of wharf demurrage or any other terminal charges or expenses that may be incurred.

* * * * *

Item No. 600

Wharfage, Definition Of

Wharfage is the charge that is assessed on all freight passing or conveyed over, onto, or under wharves or between vessels or overside vessels when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is the charge for use of wharf and does not include charges for any other service.

* * * * *

Admitted in Evidence Nov. 12, 1957.

PLAINTIFF'S EXHIBIT No. 7

WATERFRONT EMPLOYERS
OF WASHINGTON1611 Exchange Building
Seattle 4, Washington

October 14, 1957

Gentlemen:

Re Employee: Jack Cordray.

In response to your request, we furnish herewith the employment information for the employee and period requested, based on the records of employment as submitted to the Association by the direct Employers participating in the Association's collective wage and employment tax reporting system:

SSA No.: 532-12-3263; Work No.: 582; Port of Work: Seattle.

Total Wages: \$. In the period:

Total Hours: 1206 $\frac{1}{2}$ In the period: 19491187 $\frac{1}{4}$ 1950

1902 1951

1676 $\frac{3}{4}$ 1952

1684 1953

Other: 1615 1954

1881 $\frac{3}{4}$ 19551560 $\frac{3}{4}$ 19561175 $\frac{1}{2}$ 1957through
9/30/57

Very truly yours,

WATERFRONT EMPLOYERS
OF WASHINGTON,

/s/ GEORGE ORTON,
George Orton,
Acting Treasurer.

GO:ch

Admitted in Evidence Nov. 13, 1957.

DEFENDANT'S EXHIBIT "A-1"
from

to AT PIER 48 SEATTLE Date 1 DAY July 13, 1971

[illegible][illegible][illegible]

RUNNING LIGHTS		Compass on Day Sight		Compass on Starboard Sight		Logbooks	
Frame		No.	P.M.	No.	P.M.	Signs	Notes
Midnight to	A.M.	1	0 4	1	0 4	0000 0000	GUARD ON DUTY IN #4 HELD
	P.M. to Midnight	2	0 6	2	0 6		
		3	0 1	3	0 1		
		4	0 1	4	0 1		
		5	0 1	5	0 1		
		6		6			
		7		7			
		8		8			
		9		9			
		10		10			
		11		11			
		12		12			

REMARKS

ZD + 0NES

000 RBERGH ^{N/1} ON DOTY

0100 ^{1/2} RESUME DISCH # 2 - 3

0330 FINISH PUMPING # 4 DEPTANK

0345 # 5 GANG SHIFT TO # 4 TRIM GEAR & DISCH. PORTS 0/0

0400 COMM. PUMP OIL # 5 DEPTANK

0500 # 4 GANG K.O.

0600 # 2 - 3 GAGES K.O., FINISH PUMP OIL # 5 DEPTANK

0800 RBERGH RELIEVED BY SHIP'S OFFICERS

0900 - 635 ^{1/2} a/c disch. 24 kts. (23 = 22)

1000 - # 1 pump R. m. - L.

1100 - # 2 - 3 - 4 - 5 P. m. - L. # 1 ST # 5 -

[illegible]

1301 - 691 Brown bird, 28 birds.
1600 A.W. S.H. LEX 1400 on entry
1800 4/4 K.O. Pa The Bay
1900 4/4 about working 3500 7/4 1000 5-
2145 going from 30 shifted to 22
2400 Routine migration made all secure! *Paul*

BALLAST TANKS Port, Center, Starboard				REFRIGERATION (Comp.)				DRAFT OF VESSEL			
Time	Lat	Long	Temp	Observations	4	8	12 M.	Temp	at top	at bottom	at surface
1											
2											
3											
4											
5											
6											
7											
8											
9											
10											
11											
12											

M. Forward 14' 20" 20' 20"
 M. Forward 15' 20" 20' 20"
 FUEL OIL AND WATER
 Fuel Oil _____ Water Temp _____
 F.W. Fuel Oil _____ Water Temp _____
 Water Temp _____
trial



Log of the **S.S. M.V.**

ADVENTURES

Defendant's Exhibit "A-1" - (Continued) to
fromto AT PIER 48, SEATTLE Date **SATURDAY JULY 14, 1956**

Time	Lat	Course			Wind		Barometric	Temperature		Crew	Dredge	Remarks
		Standard	Cru	Steering	Direction	Force		Air	Water			
A.M.												
1												
2												
3												
4												
5												
6												
7												
8												
9												
10												
11												
12												

Latitude	Longitude	Course	Distance	Total Distance	Latitude at Day	Total Time at Sea	Arrival Date	Total Arrived Days	Departure
----------	-----------	--------	----------	----------------	-----------------	-------------------	--------------	--------------------	-----------

P.M.
1235 WIND BECOMING HEAVY WITH (STEEL PLATE) FRAME 3 LINES AFTER END OF
DATE SWING AND SLICK STEEL STANCHION IN VINE IPSIDE, AFTER END AND
BACK OF STANCHION ADRIAT. 2 L AND 4 L LINES STANCHION ABOUT 10 FEET FROM TOP.

1												
2												
3												
4												
5												
6												
7												
8												
9												
10												
11												
12												

BOWDO LINES			Connections on Bow Lines			Connections on Main Lines			Remarks	
System	No.	Time	No.	Time	State	No.	Time	State	Remarks	
Night to	A.M.									
	P.M.									
Feet										
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										

REMARKS

ZD + PMS.

000 R BURG 7/11 on duty
 0100 4/5 RESUME DISCH. # 2-3-4-5
 0500 ALL GAMES N.O.
 0530 Sailors Turn to RIGGING JUMBO GEAR
 0800 R BURG RELIEVED BY R.R. FLAHERTY R.R.
 0800 FIVE (5) gauge 1/2 inch, RESUME DISCH. # 1 CAN. 72 STAPLES
 # 3 L. 1/2 inch, heavy steel plates. # 4 L. 2 1/2 inch, heavy steel plates.
 # 5. 1/2 inch, heavy steel plates.
 1100 Slog in # 1 - 2 1/2 inch K.O. LUGS.

1200 # 1 1/2 inch RESUME DISCH. AS BEFORE.
 1200 # 5 gauge K.O. LUGS. # 3 L. (GWS) WELDED THROUGH, RELIEVED BY # 2 gauge

ENGINE PERFORMANCE

Distance in Knots	Speed in Knots	Revolutions per Min.	Arrival Time (7/11)	Departure Time (7/11)	Time in Knots	Time in Knots	Time in Knots	Time in Knots	Time in Knots	Time in Knots	Time in Knots	Time in Knots
-------------------------	----------------------	----------------------------	---------------------------	-----------------------------	---------------------	---------------------	---------------------	---------------------	---------------------	---------------------	---------------------	---------------------

1300 # 5 gauge RESUME DISCH. AS BEFORE. # 3 gauge RESUME DISCH. # 2 SHIP TO # 2,
 RESUME DISCH. L.T.D.
 1315 FINE DISCH. # 2 L.T.D. UNIVER, STARTED DISCH. # 2 L.T.D. 1330 L.A. 2007.
 1615 FINE DISCH. # 1 L.T.D. UNIVER, STARTED DISCH. # 1 L.T.D. 1500 L.A. 2007.
 1600 R.R. FLAHERTY RELIEVED BY A.W. SHIGLEY
 1615 FINE DISCH. # 2 L.T.D. UNIVER, STARTED DISCH. # 2 L.T.D. 1630 L.A. 2007.
 1640 FINE DISCH. # 1 L.T.D. UNIVER, STARTED DISCH. # 1 L.T.D. 1650 L.A. 2007.
 1700 SAILORS TURN TO SECURING JUMBO 1840 SAILORS 50. FOR SHORE
 1800 SAILORS TURN TO SECURING JUMBO 1840 SAILORS 50. FOR SHORE
 Slog about steel making 1.3, 4 x 5 2400 Slog K.O. LUGS.

BALLAST TANKS				REFRIGERATION				DRAFT OF VESSEL			
Time	Lat	Long	Temp	Time	Lat	Long	Temp	Time	Lat	Long	Temp
1				1				1			
2				2				2			
3				3				3			
4				4				4			
5				5				5			
6				6				6			
7				7				7			
8				8				8			
9				9				9			
10				10				10			
11				11				11			
12				12				12			

Log of the **S.S. WACATAMA**

Defendant's Exhibit "A-1" - (Continued)

from

Hour	Lat	Course	Wind	Temperature	Time	Distance	Remarks
	Reckoned	Obs.	Direction	Force	Air	Water	Current
1	0215	all cargo out of #5					
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
13							

Latitude	Longitude	Course	Distance	Time Distance	Latitude or Dist	Time Lat or Dist	Amount from	Time Amount from	Remarks
----------	-----------	--------	----------	---------------	------------------	------------------	-------------	------------------	---------

Hour	Lat	Course	Wind	Temperature	Time	Distance	Remarks
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
13							

Hour	Lat	Course	Wind	Temperature	Time	Distance	Remarks
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
13							

to at **Pine #2 Seattle** Date **Sunday July 15, 1936**

REMARKS **ZD + 8 HRS.**

0100 Stone assumed dead in #1, 2, 3, 4, 5
 0215 Song at #5 shift to #2 & gang at #2 shift to #4
 0320 Fanned dead #4 started showing
 0440 Song at #4 K.O. & home ship #42 Fanned dead #2 & started to show
 0500 R.R. Fanned #42 Fanned #42 Fanned #42
 0530 Fanned #42 Fanned #42 Fanned #42
 0600 Fanned #42 Fanned #42 Fanned #42
 0730 Fanned #42 Fanned #42 Fanned #42
 0800 Fanned #42 Fanned #42 Fanned #42
 0840 Fanned #42 Fanned #42 Fanned #42
 0920 Fanned #42 Fanned #42 Fanned #42

0930 Fanned #42 Fanned #42 Fanned #42

1040 Fanned #42 Fanned #42 Fanned #42

1134 Fanned #42 Fanned #42 Fanned #42

1200 Fanned #42 Fanned #42 Fanned #42

1300 Fanned #42 Fanned #42 Fanned #42

1400 Fanned #42 Fanned #42 Fanned #42

1500 Fanned #42 Fanned #42 Fanned #42

1600 Fanned #42 Fanned #42 Fanned #42

1700 Fanned #42 Fanned #42 Fanned #42

1800 Fanned #42 Fanned #42 Fanned #42

1900 Fanned #42 Fanned #42 Fanned #42

2000 Fanned #42 Fanned #42 Fanned #42

2100 Fanned #42 Fanned #42 Fanned #42

2200 Fanned #42 Fanned #42 Fanned #42

2300 Fanned #42 Fanned #42 Fanned #42

2400 Fanned #42 Fanned #42 Fanned #42

2500 Fanned #42 Fanned #42 Fanned #42

2600 Fanned #42 Fanned #42 Fanned #42

2700 Fanned #42 Fanned #42 Fanned #42

2800 Fanned #42 Fanned #42 Fanned #42

DEFENDANT'S EXHIBIT A-5

WATERFRONT EMPLOYERS
OF WASHINGTON

1611 Exchange Building
Seattle 4, Washington

October 4, 1957

Summers, Bucey & Howard
Central Building
Seattle 4, Washington

Gentlemen:

Re Employee: Jack V. Cordray.

In response to your request, we furnish herewith the employment information for the employee and period requested, based on the records of employment as submitted to the Association by the direct Employers participating in the Association's collective wage and employment tax reporting system:

SSA No.: 532 12 3263; Work No.: 582; Port of Work: Seattle.

	1957
Total Wages: \$591.07	In the period: January
462.32	February
384.40	March
369.12	April
861.77	May
485.92	June
653.56	In the period: July
359.78	August
467.42	September

Other: May wages include three weeks vacation pay accrued in 1956 and paid in 1957.

Very truly yours,

WATERFRONT EMPLOYERS
OF WASHINGTON,

/s/ GEORGE ORTON,
George Orton,
Acting Treasurer.

GO:ch

Admitted in Evidence Nov. 13, 1957.

DEFENDANT'S EXHIBIT A-6

WATERFRONT EMPLOYERS
OF WASHINGTON

1611 Exchange Building
Seattle 4, Washington

March 1, 1957

Summers, Bucey & Howard
Central Building
Seattle 4, Washington

Gentlemen:

Re Employee: Jack V. Cordray.

In response to your request, we furnish herewith the employment information for the employee and period requested, based on the records of employment as submitted to the Association by the direct

Employers participating in the Association's collective wage and employment tax reporting system:

SSA No.: 532-12-3263; Work No.:.....; Port of Work:.....

Total Wages: \$5,887.67	In the period: 1951
5,204.45	1952
5,733.97	1953
5,115.38	1954
5,845.38	1955
5,493.29	1956
1,053.41	1957
	through
	2/25/57

Other:.....

Very truly yours,

WATERFRONT EMPLOYERS
OF WASHINGTON,

/s/ J. R. SHIELDS,
J. R. Shields.

JRS:ch

Admitted in Evidence Nov. 13, 1957.

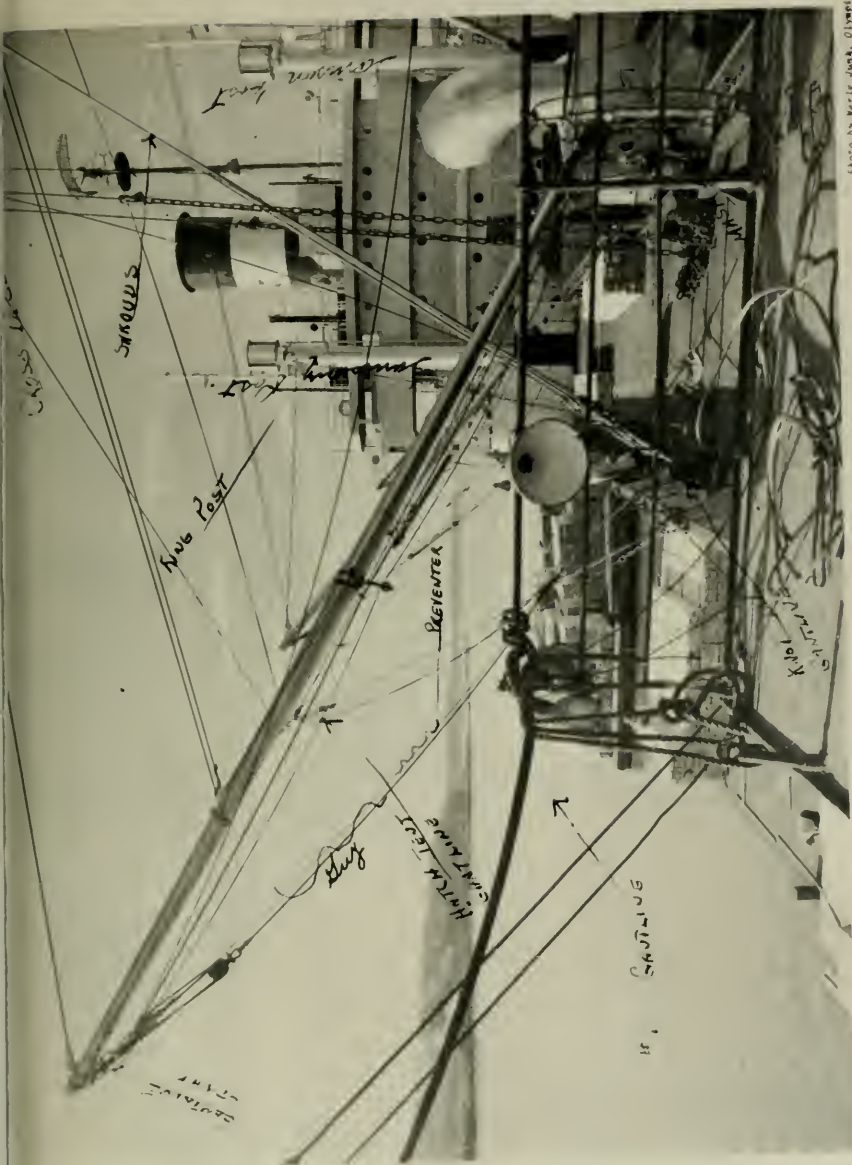


Photo by Nellie Junk, Olympia

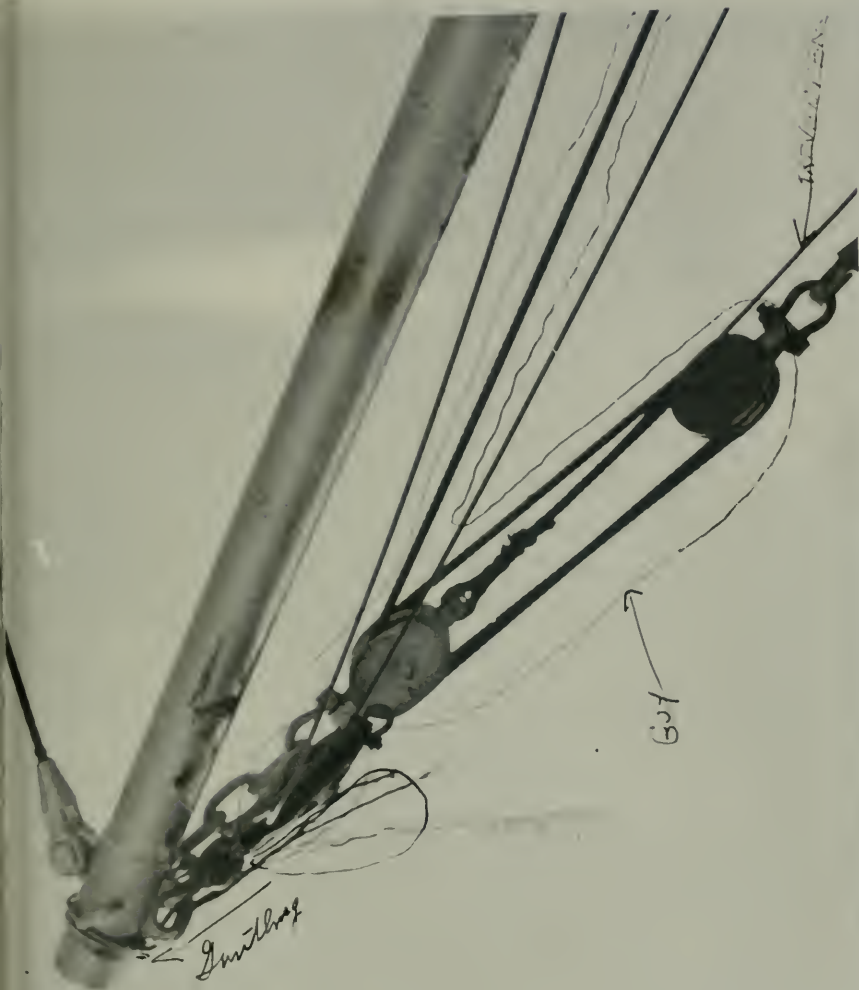


Photo by Merle Junk, Olympia

DEFENDANT'S EXHIBIT A-9

STEVEDORING CONTRACT

* * * * *

MEMORANDUM OF AGREEMENT

Made this 1st day of July, 1949.

Between: Williams, Dimond & Co. (hereinafter called the Stevedoring Company, First Party).

And: Pope and Talbot, Inc. (hereinafter called the Steamship Company, Second Party).

I.

It is mutually agreed between the parties hereto, that the Stevedoring Company will act as stevedores, and that they will with all possible dispatch, load and/or discharge all cargoes of vessels owned, controlled, chartered, or managed by the Steamship Company at the ports of Seattle and Tacoma Area, as directed. And it is agreed that the Steamship Company will grant to the said Stevedoring Company the exclusive right of handling all such cargoes as before mentioned under the terms of this agreement, and will pay for the work done by the Stevedoring Company in lawful money of the United States at the rates set forth in Schedule "A" attached hereto and made part thereof.

II.

It is understood and mutually agreed by the parties hereto:

A. That the Stevedoring Company will furnish

Defendant's Exhibit A-9—(Continued)

all necessary labor and supervision and all ordinary gear for the performance of the services described in this contract, including winch drivers and usual appliances used for stevedoring.

B. That the Steamship Company will furnish suitable booms, winches, blocks, and falls, steam and/or power, and will maintain the same in safe and efficient working condition during the progress of the work.

III.

It is understood and agreed that, in the execution of the work under this contract, the provisions of any labor agreement existing between the longshoremen and/or other labor groups and the Pacific Maritime Association governing (or in the absence of such labor agreement, any regulations or current practices of the port applicable to) longshore work performed in the ports in the Seattle and Tacoma Area shall be observed.

IV.

A. All stevedoring rates specified are based on, and subject to, the employment of present longshore and related labor at the wage scales and under the working conditions existing in the port as of the date of the execution of this contract, under respective labor agreements between the longshoremen and/or other labor groups and the Pacific Maritime Association. In the event of an increase or decrease in such wage scales or a change in such working conditions, the rates specified herein shall, as a consequence, be proportionately increased or decreased,

Defendant's Exhibit A-9—(Continued)

as of the effective date of such change, retroactively, currently, or prospectively, as the case may be.

B. The Stevedoring Company agrees to notify the Steamship Company prior to working any man by said Stevedoring Company in excess of 12 hours per day or 56 hours per week. The Steamship Company will advise the Stevedoring Company immediately after such notification is received whether or not such excess hours shall be worked. Should the Stevedoring Company fail to notify the Steamship Company as agreed above of said intention to work beyond said hours, all such excess time worked (viz., overtime on overtime) shall be for account of the Stevedoring Company. The Steamship Company shall have no right to require the Stevedoring Company to work any individual employee of the Stevedoring Company in excess of 1,000 hours in any period of 26 consecutive weeks.

V.

The Steamship Company agrees that the officers of its vessels are to give every assistance at their command to facilitate the work of loading and discharging its vessels.

VI.

The Stevedoring Company shall carry:

A. Workmen's Compensation insurance for the protection of its employees under State and Federal laws.

B. Public Liability insurance in the amount of \$250,000.00 as respects bodily injury or death of one

Defendant's Exhibit A-9—(Continued)

person, and in the amount of \$500,000.00 as respects bodily injury to, or death of, more than one person, on account of any one accident, as protection against injury to or death of any person or persons arising out of negligence of the Stevedoring Company under this agreement.

C. Property damage insurance in the amount of \$250,000.00, with a deductible amount of \$100.00 as protection against loss or injury to property arising out of negligence of the Stevedoring Company under this agreement.

VII.

The Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo overside, and for injury to or death of any person, caused by its sole negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers or other authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence or before ship finishes cargo at that Port. The Steamship Company shall be responsible for the injury to or death of any person or for any damage to or loss of property arising through the sole negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment.

VIII.

In the event of strikes, lockouts, union disputes,

Defendant's Exhibit A-9—(Continued)

or other labor disturbances the Stevedoring Company will be under no obligation to undertake performance of this contract. No liability shall attach to the Stevedoring Company if the terms of this Agreement cannot be performed due to acts of God, riots, Civil or labor disturbances, war, restraints of governments, fire, explosion, or other acts beyond its control.

IX.

The contract rates are based on the use of the two usual slingmen. When handling cargo direct to or from open cars or barges alongside vessel any extra men required are to be paid for at bare labor cost in addition to the contract rates.

X.

This agreement is subject to the following provisions with respect to charges for overtime, ship's time, handling of damaged cargo, and other extras;

A. When the Stevedoring Company is required to work at locations where travel time is required to be paid the men, in accordance with the wage scale, such travel time will be charged for at bare labor cost. When vessels are worked in the stream or other places where means of transportation for the men are required, or meal allowances must be paid in accordance with the labor agreement, any expense so incurred will be charged for at cost. The expense of transportation of gear and equipment to and from locations not accessible by Auto Truck or in the stream, will be charged for at cost.

Defendant's Exhibit A-9—(Continued)

B. Rates set forth in Schedule "A" are to be charged on all cargo handled on the basis of 2,000# weight, ~~or 40 Cubic Feet to the ton~~, weight, or measurement as freighted, as specified.

C. Said rates are for work performed during ordinary straight time working hours designated as the first six (6) hours worked between 8:00 A.M. and 5:00 P.M. during the period from 8:00 A.M. Monday to 5:00 P.M. Friday.

D. For work performed during overtime, i.e., all work in excess of six (6) hours between 8:00 A.M. and 5:00 P.M. and between 5:00 P.M. and 8:00 A.M. on week days and from 5:00 P.M. on Friday to 8:00 A.M. on Monday, and all work on legal holidays and during hours in excess of twelve (12) per day and/or fifty six (56) per week (viz., overtime on overtime) or during penalty hours or meal hours, the Stevedoring Company, in addition to the rates specified herein shall be reimbursed the amount of its extra bare labor cost. The extra wage paid for such overtime and penalty time will be as set forth in the current labor agreement governing longshore and related labor.

E. Work performed on board, around or in connection with vessels of the Steamship Company, such as rigging and unrigging special gear, discharging debris, shifting and laying special dunnage, cleaning holds, handling ship's lines and gangways shall be paid for at bare labor cost.

F. Work performed on board, around or in connection with vessels of the Steamship Company,

Defendant's Exhibit A-9—(Continued)

such as shifting and restowing cargo, shifting coal, loading mail, baggage, ship's stores or excess dunnage and carpenter or cooper work shall be paid for at bare labor cost plus 10%.

1. In case the Stevedore is called upon to open and close a hatch wherein he does not handle 50 stevedore revenue tons at the time in that hatch, he will be reimbursed for the cost of rigging and handling such beams and hatches at bare labor cost.

G. When handling cargo damaged by fire, water, oil, etc. and where such damage causes distress or obnoxious conditions, or in all cases where the men are called upon to handle cargo under distress conditions, the Stevedoring Company charges are to be based upon the bare labor cost, in accordance with the labor agreements, plus 25% for overhead, depreciation of gear, and profit, in lieu of the rates specified herein, together with the cost of gear destroyed and the cost of equipment for the protection of the men as may be required. If the condition of the cargo or packages or vessel or pier is other than in customary good order, thereby delaying prompt handling, special arrangements shall be agreed upon in lieu of the rates herein specified.

H. Whenever work is interrupted after starting, and detentions of not over fifteen minutes delay occur, the Stevedoring Company will make no charge for reimbursement therefor. Should such detention time exceed fifteen minutes delay, the Stevedoring Company will charge full detention time at bare labor cost. When men are employed and unable

Defendant's Exhibit A-9—(Continued)

to work through causes beyond the Stevedoring Company's control, or when men are to be paid for a minimum working period in accordance with the labor agreement, the cost of such waiting or idle time will be charged for by the Stevedoring Company at bare labor cost.

XI.

A. The term "bare labor cost" as used herein shall mean compensation paid as required by applicable and prevailing labor agreements plus State and Federal taxes and insurance payable on a payroll basis.

B. To all rates and charges expressed herein, including charges based on bare labor cost, there shall be added a charge of \$.10 per man hour for vacation allowance. This charge will be adjusted when the Pacific Maritime Association has determined the actual liability per man hour. This clause to apply to I. L. & W. U. ports only.

C. Where men are working in ports and under contracts covered by agreements with the International Longshoremen's Association where their vacation allowance is paid currently with their pay there will be added to all rates and charges expressed herein, ~~*including charges based on bare labor cost,~~ the differential allowed for such vacation allowance plus insurance at 11%. This differential, which is presently \$.07 per man hour, shall be charged on all straight time hours and the straight time portion of overtime hours.

* (Delete. See our letter 8/24/49.)

Defendant's Exhibit A-9—(Continued)

D. Under date of June 21, 1949 the Waterfront Employers of Washington entered into an agreement with all employees covered by contracts with the International Longshoremen's Association, District 38, establishing a welfare fund to which the employers must contribute .008 of all wages. To all rates and charges expressed herein, including charges based on bare labor cost, there shall be added (.008%)** of the total payroll. This percentage mark up shall be billed separately for the over-time differential when work is performed on over-time.

** See our letter 11/10/49.

Included in rate. See our letter 10/23/50.

XII.

This Agreement shall be in force and effect from date hereof and shall continue in force and effect until terminated by either party giving thirty days written notice to the other. At any time and from time to time the parties hereto may request a review of the rates quoted herein to determine if the rates should be revised upwards or downwards.

This Agreement shall bind, apply and inure to the benefit of the successors and assigns of the respective parties.

Defendant's Exhibit A-9—(Continued)

In Witness Whereof the parties hereto have duly executed this agreement in duplicate the day and year first above written.

/s/ By E. L. McCORMICK,
Pres. Williams, Dimond & Co.

/s/ By GERALD A. DUNDON,
V. P. and General Manager.

* * * * *

Admitted in Evidence Nov. 14, 1957.

[Endorsed]: No. 15863. United States Court of Appeals for the Ninth Circuit. Pope & Talbot, Inc., a corporation, Appellant, vs. Jack V. Cordray, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: January 21, 1958.

Docketed: January 23, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15863

POPE & TALBOT, INC., a corporation,
Appellant,

vs.

JACK V. CORDRAY, Appellee.

STATEMENT OF THE POINTS ON WHICH
APPELLANT INTENDS TO RELY UPON
APPEAL

1. The United States District Court for the Western District of Washington, Northern Division, did not have jurisdiction to entertain or adjudicate the purported cause of action premised upon the claim asserted by plaintiff that the general maritime law permits a recovery by a person occupying the status of Jack V. Cordray irrespective of whether or not the defendant and appellant was guilty of actionable negligence or irrespective of whether or not the defendant-appellant was guilty of any fault which proximately caused or proximately contributed to injury sustained by the plaintiff-appellee.

2. The District Court of the United States for the Western District of Washington, Northern Division, was without jurisdiction of the subject matter of the claim based upon the so-called unseaworthiness doctrine as enunciated by the United States Supreme Court in the case of Seas Shipping

Co. v. Sieracki, 328 U.S. 85, 90 L.ed. 1099, for the reason, inter alia, that the Supreme Court of the United States was without the power to create a right of action for damages for the benefit of a seaman, irrespective of actionable negligence on the part of the owner of a ship or the employer of a seaman, pursuant to which such seaman might recover compensatory damages by reason of injuries suffered in consequence of the unseaworthiness of a ship or a failure on the part of the owner of a ship or the employer of a seaman to supply and keep in order the proper appliances appurtenant to the ship; and in purporting to create such right of action the Supreme Court of the United States acted entirely outside its function and unconstitutionally invaded and usurped the legislative power which is vested exclusively in the Congress of the United States pursuant to Article I, Section 1, Constitution of the United States and/or the legislative power vested in the legislative body of the State of Pennsylvania pursuant to the Constitution of that State.

3. The District Court of the United States for the Western District of Washington, Northern Division, was in the status of another court of the State of Washington in respect of plaintiff-appellee's action for damages by reason of personal injuries; and the substantive law applicable to all of the facts and circumstances involved in the action was that of the State of Washington, in view of the fact that the alleged accident occurred upon navigable waters which were a part of the aquatic domain of the State of Washington; and said naviga-

ble waters were not navigable waters of the United States of America.

4. The original complaint as filed in the State Court in the case at bar did not state facts sufficient to constitute a cause of action.

5. The complaint, as amended subsequent to the removal of the action by reason of the existence of diversity of citizenship, did not state facts sufficient to constitute any cause of action in favor of the plaintiff and against the defendant pursuant to the substantive law of the State of Washington.

6. The complaint, as amended, did not contain simple, concise and direct averments of fact showing that the plaintiff was or is entitled to relief.

7. The complaint, as originally filed in the State Court, and as amended after the action was removed to the District Court of the United States for the Western District of Washington, Northern Division, did not state facts sufficient to constitute actionable negligence or any other actual cause of action in favor of the plaintiff and against the defendant.

8. The trial court erred in each and every ruling, order, decision or action adverse to the defendant-appellant appearing within and shown by the matters and things included within defendant-appellant's designation of the contents of the transcript of record on appeal.

9. The evidence is insufficient to support the general verdict rendered by the jury or the judgment

based upon said verdict; and the evidence is also insufficient to support implied findings of fact in favor of the plaintiff in respect of the required elements of actionable negligence or the required elements of any other actual cause of action available to the plaintiff or provided by any valid statute or any other valid law pursuant to which the plaintiff might claim the existence of a cause of action for damages by reason of bodily or personal injury.

10. The evidence is insufficient to support an implied finding of fact by the jury that at the time and place of the alleged injury suffered by plaintiff he was an invitee of the defendant-appellant; and it will also be contended on appeal that the plaintiff-appellee was at all times pertinent nothing more than a trespasser.

11. The contract pursuant to which plaintiff's employer, Olympic Steamship Company, agreed to and was performing certain services as an independent contractor was not a maritime contract; and plaintiff, as an employee of said Olympic Steamship Company, was not at any time engaged in the performance of any maritime service. Pursuant to the only possible contract in accordance with which the said Olympic Steamship Company was performing service of any kind or character, it was agreed that said employer of plaintiff was to have nothing whatever to do with the unloading of the vessel upon which plaintiff was standing or walking at the time he sustained his alleged injury.

12. The trial court erred in refusing to grant the

motions, and each thereof, made by the attorney of record for defendant-appellant. By the foregoing, defendant-appellant refers to the various motions, and each thereof, included within its designation of those portions of the record on appeal which are to be included in the printed transcript of record, said designation being the one which is served and filed simultaneously with this particular document.

13. The trial court erred, to the prejudice of defendant-appellant, in giving instructions to the jury upon the request of the plaintiff and also upon the trial court's own motion; and in refusing to give pertinent and correct instructions as proposed by defendant-appellant.

14. The trial court erred in denying the motions of defendant-appellant to dismiss plaintiff's action, to direct a verdict in favor of the defendant-appellant as to each alleged separate claim or separate cause of action; and in refusing to grant the motions of defendant-appellant for judgment notwithstanding the verdict of the jury; and in refusing to grant the motion of defendant-appellant for a new trial; and in refusing to require the plaintiff-appellee to agree to a reduction in the amount of the damages awarded by the jury or in lieu thereof to grant a new trial upon all issues.

15. A particular and specific contention will be raised in respect of the act of the trial judge in reading to the jury the contents of paragraph VIII of the pre-trial order, and, in addition thereto, in

interpolating and adding thereto additional and prejudicial statements of fact.

16. Excessive damages were awarded under the influence of passion and prejudice on the part of the jury or by reason of the failure on the part of the trial court to properly instruct the jury upon the subject of damages and the amount of the verdict is not supported by the competent or relevant or material evidence in the record. The trial court erred as pointed out by the attorney of record for the defendant-appellant in the exceptions taken to the instructions as given and to the refusal of the trial court to instruct as requested by the defendant, as shown by that portion of the Reporter's Transcript of the oral proceedings containing the instructions given and the exceptions taken thereto by the defendant-appellant and the exceptions also taken by defendant-appellant to the refusal of the trial court to instruct in accordance with the proposed and requested instructions on behalf of defendant-appellant; and said matters were not otherwise fairly or accurately covered by the instructions as actually given to the jury. The trial court erred in refusing to submit special interrogatories, as requested by the defendant-appellee, to the jury. This action on the part of the trial court was arbitrary and a clear abuse of discretion because of the fact that the trial court permitted the jury to render a general verdict in respect of two separate and distinct claims and did not in any manner require the jury to indicate whether their verdict was in

favor of the plaintiff with respect to both of said claims or only in respect of one of them.

Dated: January 28, 1958.

LASHER B. GALLAGHER,
CHARLES B. HOWARD,
/s/ By LASHER B. GALLAGHER,
Attorneys for Appellant.

Affidavit of Service Attached.

[Endorsed]: Filed Jan. 28, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION BY APPELLANT OF
RECORD TO BE PRINTED

Pope & Talbot, Inc., a corporation, Appellant herein, designates the following pleadings, documents and portions of the record on appeal as transmitted to the Clerk of the above entitled Court by the Clerk of the United States District Court to be printed or otherwise reproduced and included in the transcript of record on appeal; and requests that said matters be printed in the order, consecutively, as hereinafter designated; and that in those cases where the testimony of witnesses appears in separate places in the Reporter's Transcript by reason of the temporary withdrawal of a particular witness for the purpose of permitting another witness to testify out of order, that all of the testimony

of such witness or witnesses as designated hereinafter be printed in the same section of the transcript of record so that all designated testimony given by any particular witness will be readily available for examination by the Court.

Appellant's designation is as follows:

(Note: The designations hereinafter set forth are identified by the letters of the alphabet. The arabic figures referred to in the designations are taken from the Certificate of the Clerk of the United States District Court.)

A. 1. Petition for removal from State Court to District Court, with complaint attached.

B. 4. Defendant's answer.

C. 14. Notice of application for trial amendment by plaintiff.

D. 18. Order granting leave for amendment of plaintiff's complaint.

E. 19. Defendant's answer to amendment of plaintiff's complaint.

F. 26. Pre-trial order.

G. 40. Defendant's motion for dismissal of action under FRCP Rule 41(b).

H. 41. Defendant's motion for directed verdict against plaintiff under FRCP Rule 50, at close of all the evidence.

I. 35. Defendant's requested instructions as follows:

Instruction No. 4;

Instruction No. 5;

Instruction No. 7;

Instruction No. 10;

Instruction No. 12;

Instruction No. 15;

J. Special interrogatories 1-6 (located at end of defendant's proposed instructions).

K. 42. Verdict for plaintiff.

L. Excerpt from Clerk's Docket entries on November 18, 1957 showing entry of judgment on verdict.

M. 43. Defendant's motion for new trial under FRCP Rule 59.

N. 44. Motions to have verdict and any judgment thereon set aside and for entry of judgment in favor of defendant.

O. 49. Order denying motion for new trial and denying motion for judgment NOV.

P. 50. Cost and supersedeas bond on appeal.

Q. 51. Notice of appeal.

R. 52. Appellant's designation of record on appeal.

S. 64. Appellant's second supplemental designation of record on appeal.

T. 65. Appellant's third supplemental designation of record on appeal.

U. 53. Statement of points under FRCP Rule 75(d) upon which appellant intends to rely.

V. 66. Order directing transmission of original exhibits.

W. The following portions of plaintiff's exhibit No. 3—Seattle Terminals' Tariff No. 100:

Text of Item No. 20—on acceptance of tariff as appears on original page 13.

Text of Item No. 120 as appears on original page 14.

Text of Item No. 380, being entire contents of body of original page 20.

Text of line 1 of original page 22, identified by the beginning words "Column A".

Text of Items 420 and 430, being entire body of original page 23.

X. The following portions of plaintiff's exhibit No. 4, being Seattle Terminals' Tariff No. 2-D:

List of participating terminals, including Olympic Steamship Co., Inc., as appears in body of second revised page 4.

Text of Items No. 10 and 30 as appear on original page 14.

Text of Item No. 90 as appears on first revised page 15.

Text of Items 110 and 130 as appear on original page 16.

Text of Items No. 140 and 190 as appear on original page 17.

Text of Items 200, 210 and 220 as appear on original page 18.

Text of Item No. 600 as appears on original page 29.

Y. Text of all entries in defendant's exhibit A-1 (Bridge Log Book) for dates of July 13, 14 and 15, 1956. (Photostatic copies.)

Z. Reproductions of defendant's exhibits A-7 and A-8, being photographs on ship.

AA. Excerpt from defendant's exhibit A-9 from

and including the words "Stevedoring Contract" to and including the words "General Manager". This document is further identified by the words, in full caps, "Memorandum of Agreement: Made this 1st day of July, 1949."

BB. Text of defendant's exhibits A-5 and A-6, (being Waterfront Employers' letters concerning earnings of plaintiff).

CC. Text of plaintiff's exhibit No. 7 (being Waterfront Employers' letter reporting hours worked by plaintiff).

DD. Appellant's Statement of Points under CA9 Rule 17(6).

EE. 67. Contents of Court Reporter's Transcript of oral proceedings [Statement of Facts], Volumes I and II, from beginning to end thereof, but excluding the following pages or portions thereof:

Page 1, line 24 through page 2, line 9;

Page 2, line 12 through page 6, line 12;

Page 7, line 8 through line 13;

Page 8, line 4 through line 7;

Page 14, line 6 through line 11;

Page 18, line 17 through line 22;

Page 20, line 9 through line 17; and line 19 through line 25;

All of colloquy from page 21, line 1 through page 28, line 14;

Page 29, line 7 through line 25;

Page 30, line 1 through line 2; and line 10 through line 13; and line 19 through line 25;

Page 31, line 1 through line 9; and line 17 through line 25;

Page 32, line 1 through line 7; and line 17 through line 25;

Page 33, line 13 through line 25;

Page 34, line 1 through line 4;

Page 36, line 6 through line 12; and line 23 through line 25;

Page 38, line 22 through line 25;

Page 39, line 24 through line 25;

Page 40, line 1 through line 9;

Page 42, line 17 through line 25;

Page 43, line 1 through line 9; and line 15 through line 25;

Page 44, lines 1 and 2; and line 18 through line 23;

Page 56, line 23 through line 25;

Page 57, line 1 through line 14; and line 25;

Page 58, line 1 through line 14;

Page 63, line 14 through line 23;

Page 65, line 1 through line 5; and line 10 through line 11; and line 15 through line 17;

Page 66, line 1 through line 6; and line 13 through line 14; and line 20 through line 24;

Page 67, line 4 through line 8; and line 13 through line 14;

Page 68, line 12 through line 25;

Page 70, line 23 through line 25;

Page 75, line 20 through line 22;

Page 77, line 14 through line 18;

Page 78, line 6 through line 17; and line 19 through line 25;

Page 79, line 1 through line 25;

Page 80, line 1 through line 18;

Page 82, line 19 through line 22;

Page 84, line 3 through line 22;

Page 86, line 11 through line 14;

Page 89, line 23 through line 25;

Page 90, line 1 through line 7;

Page 93, line 6 through line 14;

Page 98, line 7 through line 10;

Page 103, line 8 through line 12;

Page 108, line 5 through line 9;

Page 112, line 7 through line 14;

Page 117, line 16 through line 22;

Page 147, line 1 through line 16; and line 18 through line 25;

Page 148, line 10 through line 17;

Page 150, line 4 through line 15;

Page 156, line 15 through line 23;

Page 163, line 23 through line 25;

Page 164, line 1 through line 24;

Page 165, line 5 through line 9; and line 14 through line 22;

Page 166, line 3 through line 25;

Page 167, line 1 through line 3; and line 18 after the word "over" through line 22;

Page 175, line 11 through line 14; and line 16 through line 25;

Page 176, line 1 through line 19;

Page 177, line 3 through line 14; and line 23 through line 25;

Page 178, line 1 through line 21;

Page 181, line 18 through line 25;

Page 182, line 1 through line 12;

Page 190, line 3 through line 15;

Page 196, line 15 through line 25;

Page 197, line 1 through line 3;

Page 198, line 9 through line 17;

Page 203, line 2 through line 10;

Page 215, line 10 through line 25;

Page 216, line 1 through line 13;

Page 220, line 7 through line 19;

Page 221, line 23 through line 25;

Page 222, line 23 through line 25;

Page 223, line 1 through line 6; and line 23 through line 25;

Page 224, line 1 through line 25;

Page 225, line 1 and line 2;

Page 228, line 12 through line 24;

Page 231, line 16 through line 25;

Page 234, line 17 through line 20;

Page 236, line 7 through line 24;

Page 237, line 11 through line 16;

Page 238, line 5 through line 10; and line 18 through line 25;

Page 241, line 14 through line 25;

Page 242, line 13 through line 25;

Page 243, line 1 through line 3; and line 18 through line 25;

Page 244, line 1 through line 6;

Page 245, line 5 through line 25;

Page 246, line 9 through line 14; and line 21 through line 25;

Page 247, line 1 through line 10; and line 20 through page 250, line 20;

All of argument and colloquy between Court and counsel appearing from page 251 through page 273;

Page 300, line 2 through line 20;

Page 301, line 15 through line 21;

Page 302, line 8 through line 15;

Page 303, line 2 through line 25;

Page 304, line 1 through line 12;

Page 305, line 4 through line 18;

Page 307, line 6 through line 24;

Page 311, line 17 through line 22;

Page 319, line 1 through line 18;

Page 321, line 6 through line 25;

Page 329, line 6 after words "a practice" through line 13;

Page 342, line 5 through line 25;

Page 343, line 1 through line 3;

Page 361, line 6 through line 11; and line 17 through line 25;

Page 362, line 1 through line 22; and line 24 and line 25;

Page 363, all of page except line 15;

Page 364, line 1 through line 18;

Page 367, line 6 through page 387, line 6;

Page 388, line 22 through page 389, line 12;

Page 395, line 18 through line 25;

Page 405, line 6 through line 14; and line 18 through line 25;

Page 406, line 1 through line 9;

Page 411, line 19 through line 25;

Page 415, line 1 through line 23;

Page 416, line 1 through 11; and line 15 through line 23;

Page 419, line 10 through line 25;

Page 420, line 1 through page 447, line 18;

Page 448, line 4 through page 471, line 6;

Page 492, line 17 through line 21;

Page 495, line 7 through line 14;

Page 499, line 20 through page 503, line 14;

Page 514, line 21 through page 515, line 13;

Page 516, line 13 through line 22;

Page 522, line 14 through line 24;

Page 523, line 1 through line 13; and line 21 through line 25;

Page 524, line 1 through line 11;

Page 526, line 21 through page 528, line 4;

Page 529, line 5 through page 530, line 19;

and

Page 530, line 24 through page 532, line 12.

FF. A copy of this designation.

Dated: January 28, 1958.

LASHER B. GALLAGHER,

CHARLES B. HOWARD,

By LASHER B. GALLAGHER,

Attorneys for Appellant.

Affidavit of Service Attached.

[Endorsed]: Filed Jan. 28, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

AMENDED AND SUPPLEMENTAL DESIGN-
NATION BY APPELLANT OF RECORD
TO BE PRINTED

Line 19, page 8 of original "Designation by Appellant of Record to be Printed" should read "Page 147, line 1 through line 16; and";

Page 10, lines 19-20-21 of original "Designation by Appellant of Record to be Printed" is withdrawn and the following is substituted therefor: "From and including the words 'I found', page 255, line 13, to and including line 17, page 260; and from and including line 8, page 261, to and including line 2, page 263. [All of the remaining argument and colloquy between Court and counsel commencing with line 5, page 251, to and including line 6, page 273, is to be printed]".

Also print a copy of this "Amended and Supplemental Designation by Appellant of Record to be Printed".

Dated: January 29, 1958.

LASHER B. GALLAGHER,
CHARLES B. HOWARD,
/s/ By LASHER B. GALLAGHER,
Attorneys for Appellant.

Affidavit of Service Attached.

[Endorsed]: Filed Jan. 29, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OF RECORD TO BE PRINTED

Appellee herein designates for printing the following additional pages or portions thereof, of the contents of Court Reporter's Transcript of oral proceedings (Statement of Facts), Volumes I and II, as excluded in whole or part by appellant's designation:

Page 30—Line 20 through Line 25.

Page 31—Line 1.

Page 33—Line 13 through Line 17.

Page 149—Line 1 through Line 16 and Line 18 through Line 25.

Page 178—Line 5 through Line 25.

Page 196—Line 15 through Line 25.

Page 197—Line 1 through Line 3.

Page 239—Line 1 to Page 273, Line 10.

Page 295—Line 22 to Page 321, Line 1.

Page 367—Line 6 through Line 23.

Page 370—Line 22 through Line 25.

Page 371—Line 1 through Line 25.

Page 372—Line 1 through Line 25.

Page 373—Line 1 through Line 5.

Page 426—Line 1 through Line 25.

Page 427—Line 1 through Line 10.

Page 429—Line 20 through Line 25.

Dated February 4, 1958.

/s/ PHILIP J. POTH,
Attorney for Appellee.

Affidavit of Service Attached.

[Endorsed]: Filed Feb. 5, 1958. Paul P.
O'Brien, Clerk.



No. 15864 ✓

United States
Court of Appeals
for the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,
Appellant,
vs.
WILLIAM A. HILTON,
Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILED

MAR 12 1958



No. 15864

**United States
Court of Appeals**
for the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,

Appellant,

vs.

WILLIAM A. HILTON,

Appellee.

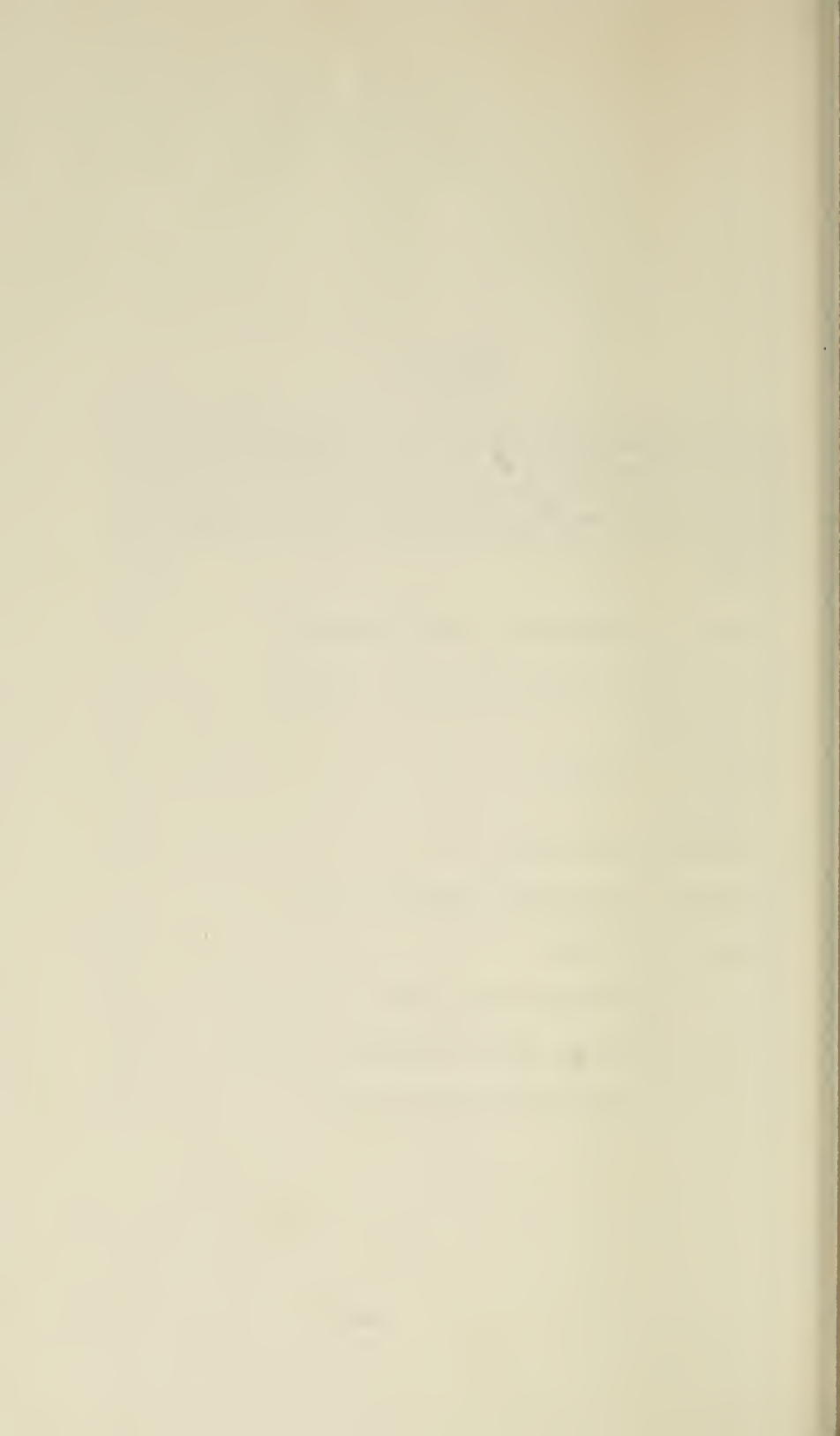
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

L. EUGENE WILLIAMS,
Attorney, City of Anchorage,
City Hall, P. O. Box 400,
Anchorage, Alaska,
For the Appellant.

WILLIAM T. PLUMMER,
United States Attorney;

DONALD A. BURR,
Assistant United States Attorney,
Federal Building,
Anchorage, Alaska,
For the Appellee.

21

In the District Court for the District of Alaska,
Third Division

No. A-13,425

CITY OF ANCHORAGE, a Municipal Corporation,
Plaintiff,

vs.

WILLIAM A. HILTON,

Defendant.

AGREED STATEMENT AS
RECORD ON APPEAL

Inasmuch as the question presented by the appeal of the City of Anchorage to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause can be determined without examination of all the pleadings, evidence and proceedings in the District Court, the parties have prepared and signed this statement of the case showing how the questions arose and were decided in the District Court, and setting forth only so much of the facts offered and proved or sought to be proved as are essential to the decision of the question by the Court of Appeals. The following stipulation of facts was made between the parties to this action and will serve as properly presenting the questions for determinations by the Court of Appeals. That statement of facts agreed on below was essentially the same as the following adopted as the agreed statement of facts for purposes of appeal and is as follows:

Plaintiff is a municipal corporation, organized and existing by virtue of the laws of the Territory of Alaska. The defendant is now, and at all times herein mentioned has been, the duly appointed, qualified and acting Clerk of the United States District Court for the District of Alaska, Third Judicial Division.

One Samuel Austin was tried and convicted on the 6th day of July, 1956, in the Magistrate's Court for the City of Anchorage for a violation of the ordinances of said city, and therein was fined the sum of One Hundred and Fifty Dollars (\$150.00); that thereafter, according to the statutory authority, he gave verbal notice of appeal from said judgment to the United States District Court for the District of Alaska, Third Judicial Division; that on the 6th day of July, 1956, pursuant to said notice of appeal, the said City Magistrate filed a complete transcript of the cause against said Samuel Austin in the office of the Clerk of the United States District Court for the District of Alaska, Third Judicial Division, Anchorage, Alaska; that thereafter said cause came on for hearing in the said District Court pursuant to the provisions of Section 16-1-70 and Sec. 68-9-10 ACLA 1949. The case was prosecuted by the attorney for the City of Anchorage.

That on the 10th day of September, 1956, the said District Court found the said Samuel Austin guilty of the charge of violating the ordinances of the City of Anchorage and imposed a fine upon him of One Hundred Dollars (\$100.00). Formal Judgment, ad-

judging the said Samuel Austin guilty and imposing such fine was signed by the judge of said District Court and entered in the records of said court on the 18th day of September, 1956.

On or about the 15th day of September, 1956, the said Samuel Austin deposited or caused to be deposited in the office of the Clerk of the District Court the sum of One Hundred Dollars (\$100.00) in full payment of the fine so imposed upon him by the said District Court.

The plaintiff, City of Anchorage, thereafter demanded that the defendant remit or pay to the City of Anchorage the fine of One Hundred Dollars (\$100.00) so imposed by the District Court on the aforementioned defendant. The clerk of the court refused and continues to refuse to pay the sum or any part thereof to the plaintiff, City of Anchorage. Thereafter an opinion was filed in this cause on the 4th day of October, 1957, which opinion was as follows:

[Title of District Court and Cause.]

No. A-13,425

OPINION

This case is brought before the court upon the following stipulated facts.

The Magistrate's Court of the City of Anchorage convicted Samuel Austin of the crime of indecent exposure, in violation of a municipal ordinance, and

Dated at Anchorage, Alaska, this 1st day of October, 1957.

/s/ J. L. McCARREY, JR.,
U. S. District Judge.

Thereafter, the defendant submitted a judgment in accordance with the opinion. Said judgment was as follows:

[Title of District Court and Cause.]

No. A-13,425

JUDGMENT

The above-entitled cause came on regularly for trial before the Court, and was duly submitted for consideration by way of briefs by both plaintiff and defendant, and the Court, after due deliberation, rendered its opinion on the 1st of October, 1957, incorporating therein appropriate findings of fact and conclusions of law in lieu of separately stating same under the provisions of Rule 52 FRCP.

Now, therefore, pursuant to said opinion, it is determined and ordered that plaintiff's cause of action be and the same is hereby dismissed without cost to either party.

Dated this 28th day of October, 1957, at Anchorage, Alaska.

/s/ J. L. McCARREY, JR.,
District Judge.

Thereafter on the 12th day of November, 1957, the plaintiff, City of Anchorage, filed the following Notice of Appeal:

[Title of District Court and Cause.]

No. A-13,425

NOTICE OF APPEAL

To the Clerk of the District Court, Third Division,
District of Alaska: Sir:

Notice is hereby given that the City of Anchorage, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the District Court for the Third Division, District of Alaska, dismissing with prejudice the action of the City of Anchorage, which action was dismissed by judgment entered on October 28, 1957.

/s/ L. EUGENE WILLIAMS,
Attorney for Plaintiff, City
of Anchorage.

The foregoing constitutes the record on appeal in the above-entitled cause pursuant to Rule 76 of the Federal Rules of Civil Procedure.

/s/ L. EUGENE WILLIAMS,
Attorney for Plaintiff, City
of Anchorage, Alaska;

/s/ DONALD A. BURR,
Assistant United States Attorney, Attorney for
Defendant.

Approved as record on appeal:

[Seal] /s/ J. L. McCARREY, JR.,
District Judge.

Dated at Anchorage, Alaska, this 20th day of December, 1957.

/s/ J. L. McCARREY, JR.,
District Judge.

[Endorsed]: Filed and entered December 20, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 76 of the Federal Rules of Civil Procedure, I am transmitting herewith original statement of the case, executed by respective counsel of record, including copies of the opinion of the court, the judgment of the court and notice of appeal, approved by the judge of the above-entitled court, and followed by a statement of the points relied on by the appellant, together with photo copy of motion and order extending time to docket appeal to January 31, 1958.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from judgment filed and entered in the above-entitled court on October 28, 1957.

Dated at Anchorage, Alaska, this 20th day of January, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 15864. United States Court of Appeals for the Ninth Circuit. City of Anchorage, a Corporation, Appellant, vs. William A. Hilton, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed January 22, 1958.

Docketed: January 24, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15864

CITY OF ANCHORAGE, a Municipal Corporation,

Appellant,

vs.

WILLIAM A. HILTON,

Appellee.

ADOPTION OF STATEMENT
AND DESIGNATION

Comes Now the City of Anchorage, Appellant, by its attorney, L. Eugene Williams, pursuant to the provisions of Rule 17 (6) of the Rules of this Court, and hereby adopts for purposes of this appeal, the statement of points filed with the clerk of the trial court.

Dated this 22nd day of January, 1958.

/s/ L. EUGENE WILLIAMS,
Attorney for Appellant, City
of Anchorage.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 24, 1958.

[Title of Court of Appeals and Cause.]

No. 15864

STIPULATION

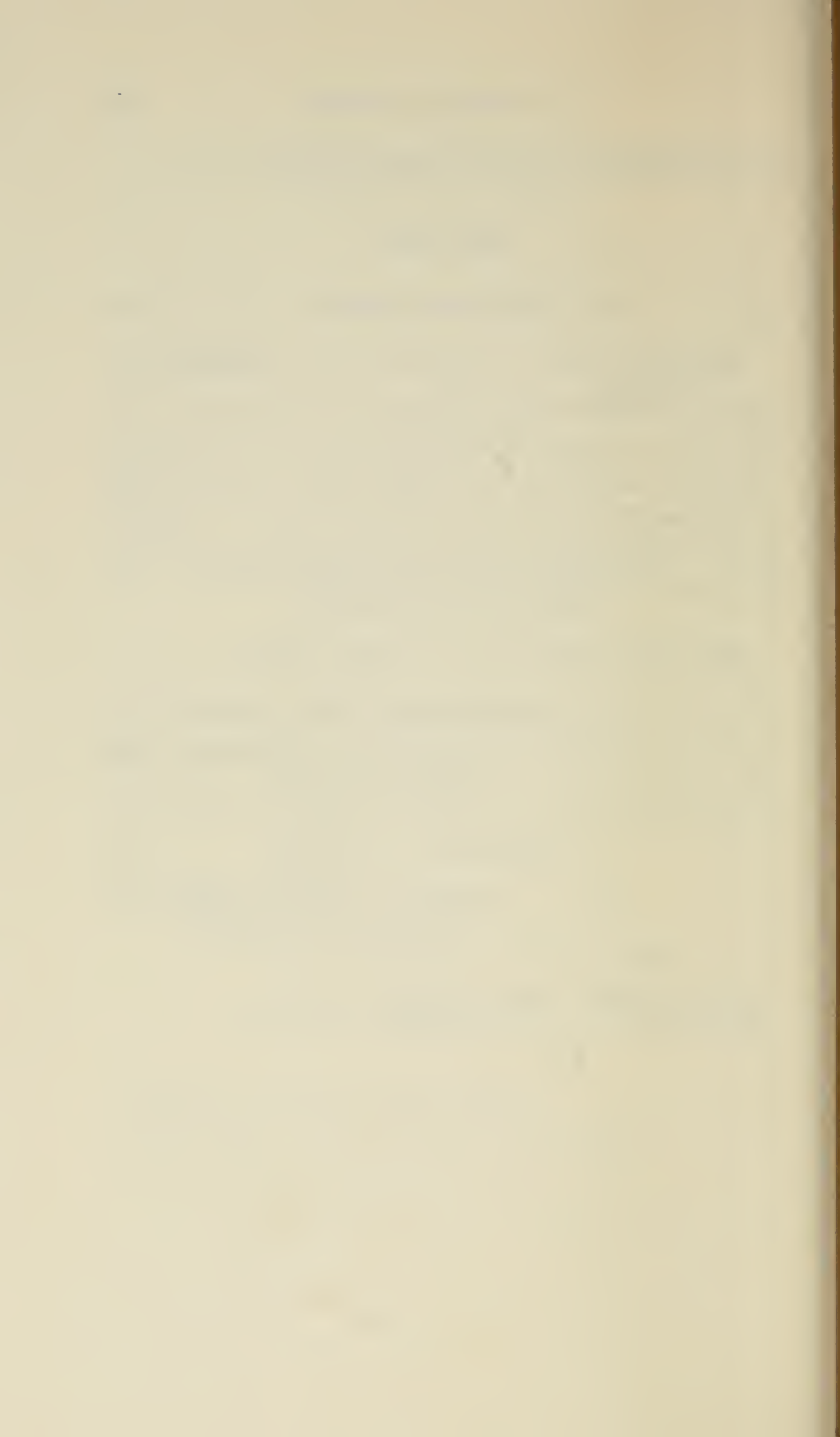
Appellant, City of Anchorage, and Appellee, William A. Hilton, acting through their attorneys, having filed an agreed statement of record on appeal, stipulate and agree that this shall be the record designated in the United States Court of Appeals for the Ninth Circuit and agree that this record may be printed as the record on appeal.

Dated this 22nd day of January, 1958.

/s/ L. EUGENE WILLIAMS,
Attorney for Appellant, City
of Anchorage;

/s/ DONALD A. BURR,
Assistant United States At-
torney, for Appellee.

[Endorsed]: Filed January 24, 1958.



No. 15,864

IN THE

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

WILLIAM A. HILTON,

Appellee.

REPLY BRIEF FOR THE APPELLANT.

JAMES M. FITZGERALD,

City Attorney, City of Anchorage,
Box 400, Anchorage, Alaska,

L. EUGENE WILLIAMS,

Assistant City Attorney, City of Anchorage,

EDWARD A. MERDES,

City Attorney, City of Fairbanks,

JOHN SHAW,

City Attorney, City of Palmer,

SEABORN J. BUCKALEW,

City Attorney, City of Seward,

Attorneys for Appellant.

FILED

MAY 6 1968

PAUL P. O'BRIEN, Clerk



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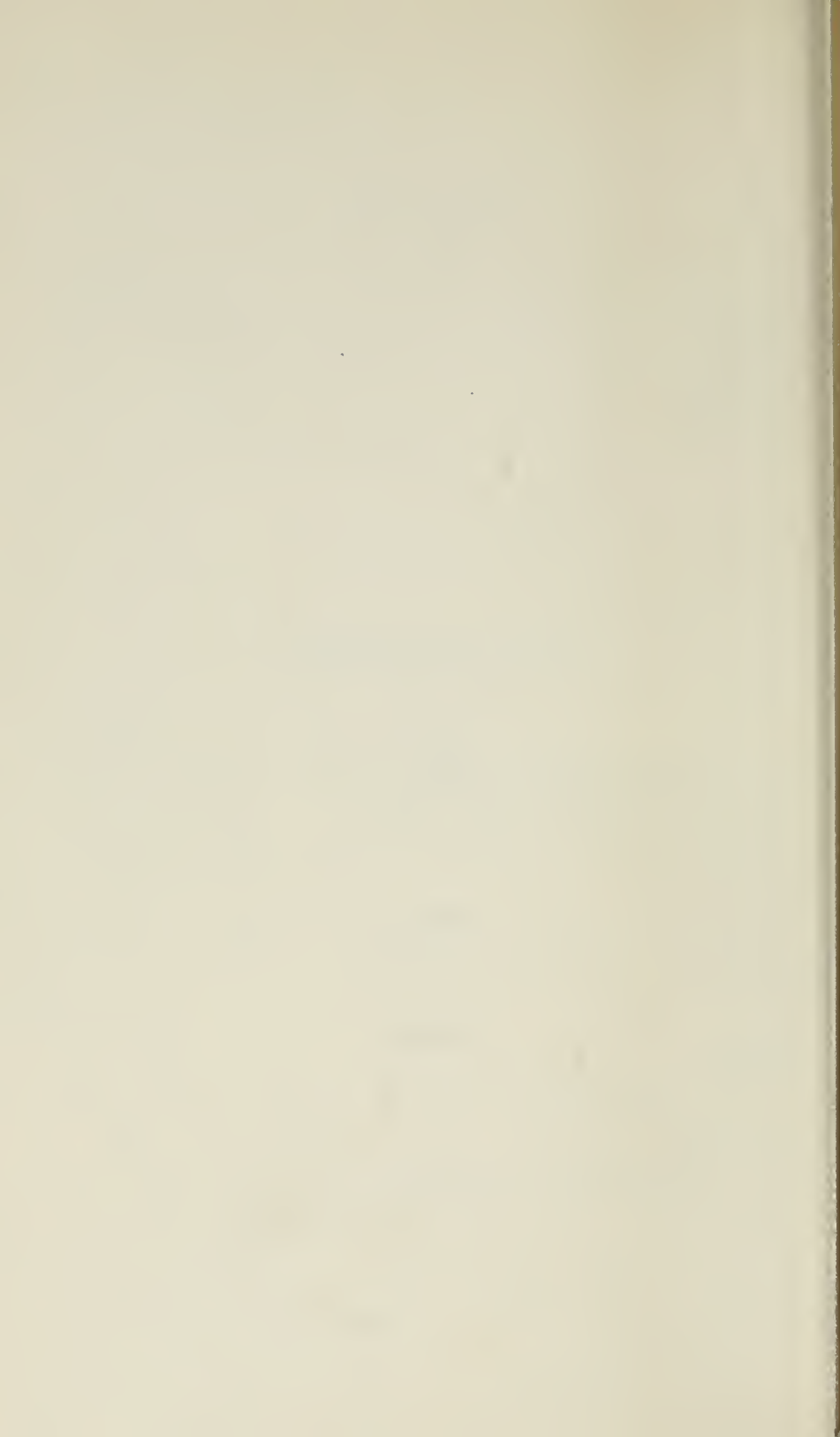
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No. 15,864

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CITY OF ANCHORAGE, a municipal corporation,

vs.

WILLIAM A. HILTON,

Appellant,

Appellee.

REPLY BRIEF FOR THE APPELLANT.

INTRODUCTION.

This is a reply brief. Appellant shall not attempt to repeat or restate the arguments already set forth in the main brief. However, as appellee has raised a jurisdictional question unsupported by the record, appellant finds it necessary to include two documents in the appendix to this brief. These documents are (1) a copy of the docket entries in *City of Anchorage v. Hilton* and (2d) a notice of entry of judgment. It is felt that this procedure is necessary in order to refute appellee's statement as to lack of jurisdiction, as the present transcript and record is an agreed statement on record and appeal and does not show the two documents mentioned.

ARGUMENT.

Appellee's brief raises for the first time, and unsupported by the record, the question of jurisdiction, urging that the appellant's notice of appeal was not timely filed. (Appellee's brief, page 1.) Appellee urges the case of *Matteson v. United States*, 240 F. 2d 517 in support of his position. In the above cited case the jurisdiction in question was raised by a motion to dismiss. The above cited case is sound, based on the state of facts that existed, however, the facts in this case are substantially different. It should be noted that this case is before the United States Court of Appeals for the Ninth Circuit on an agreed statement as record on appeal. (Tr. p. 3.) On page 8 of the transcript the judgment that was entered in the District Court appears, followed by the notice of appeal, the dates appearing on the documents. Appellee says in his brief: "The opinion and decision of the District Court filed and entered on the 4th day of October, 1957 was final and decisive, and is set forth on pages 5-7 of the transcript." (Appellee's brief, page 1.) It should be noted that there is no mention made of this fact in the agreed statement as the record on appeal. (Tr. p. 3 and following.) There is no mention made that anything other than the judgment that appears on page 8 is the judgment from which the appeal was taken. (Tr. p. 8.) There are further reasons why appellee's argument and challenge to the jurisdiction must fail. They are as follows:

Rule 58 of the Federal Rules of Civil Procedure provides in part, "The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment, and the judgment is not effective before such entry." A copy of the docket entries made in the District Court in this cause indicates that on October 4, 1957 an opinion was entered and on the next line it indicates that on October 28, 1957 the judgment of dismissal without costs to either party was entered. Although the court, in *Matteson v. United States* (Ibid. p. 518) goes into the provisions of Rule 58, it does not indicate one way or the other whether a docket entry of judgment was entered after the opinion. If the opinion was meant to be the judgment in this case, then the Clerk, appellee here, failed to follow the provision of Rule 58 and failed to enter judgment as he was required to by the Rule. If then, the opinion was the judgment, although neither party treated it as such, then can the appellee rely on his own failure to follow the Federal Rules in urging that the filing of the notice of appeal in this case was not within the prescribed time? The judgment is considered as final and perfect for appeal purposes when entered by the Clerk. (*In re Hurley Mercantile Co.*, 56 F. 2d 1023 cert. denied *Atascosa County State Bank of Jourdanton, Texas v. Coppard*, 52 S. Ct. 580, 286 U. S. 555, 76 L. Ed. 1290.) The "docket" indicates judgment entered on 28th day of October, 1957. (Appendix, page iii.)

The second document in the appendix is a copy of the notice of entry of judgment as signed and sent out by the Clerk of the Court for the District Court of Alaska for the Third Judicial Division. This notice of entry of judgment is in accordance with the local practice in the Third Division. This notice was sent out following the entry of judgment on October 28, 1957. Appellee apparently thought he was entering a judgment on October 28, 1957 and sent out the notice in accordance with the local practice. Appellant, assuming that the notice of entry of judgment sent out by the appellee was correct then filed his notice of appeal on November 12, 1957, within the required time for taking an appeal to this court. Appellee's argument that this court lacks jurisdiction is without merit, unless perhaps appellee is suggesting that because appellee is in this case a party litigant, he can receive a judgment, docket the same as a judgment, send out a notice that judgment has been entered, while wearing the hat of Clerk of Court, but then for purposes of dismissing an appeal while wearing the hat of a litigant, can urge that the opinion filed on October 4, 1957 was really the judgment and therefore the notice of appeal taken by filing the same on November 12, 1957 was not timely.

It is further urged that in reading the *Matteson* case (Ibid.), it appears there is some conflict between the Circuits as to this ruling. A reading of the opinion alone does not give the necessary facts to put it

on all fours with the factual situation in the instant case, therefore, appellant urges that the appeal was timely and the court has jurisdiction.

Appellee's brief, page 6, says, "The very question here involved was submitted by the Director of the Administrative Office of the United States Courts to the Comptroller General of the United States." Appellee then refers to a letter from the Comptroller General of the United States. Appellant urges that this inclusion is improper. Neither the Comptroller General nor the Administrative Office of the United States courts are parties to this suit. It is urged that these letters and the opinions expressed therein are self serving statements written in an advisory capacity and should not be considered by this court in the determination of this appeal. The Comptroller contends (Appellee's brief, pages 9-10) that the City's position as to the disposition of fines is based on 16-1-35 ACLA 1949, as amended by 44 Session Laws 1953. This seems to leave the impression that if the Territorial Legislature passed such an act as it did and if this were interpreted to mean that fines imposed, whether they be in the Magistrate's Court or in the District Court, belong to the City, the Legislature would not be acting within the scope of its power, because of Section 9 of the Organic Act. However, appellant has already pointed out (Appellant's opening brief, page 15) that the act we rely on, 33 Stats. 529, Chapter 1778, is an Act of Congress and did not originate as an act of the Territorial Legislature.

CONCLUSION.

For the reasons stated in the appellant's opening brief, it is submitted that the District Court's judgment should be reversed.

Dated, Anchorage, Alaska,
May 1, 1958.

Respectfully submitted,

JAMES M. FITZGERALD,
City Attorney, City of Anchorage,

L. EUGENE WILLIAMS,
Assistant City Attorney, City of Anchorage,

EDWARD A. MERDES,
City Attorney, City of Fairbanks,

JOHN SHAW,
City Attorney, City of Palmer,

SEABORN J. BUCKALEW,
City Attorney, City of Seward,

Attorneys for Appellant.

(Appendix Follows.)

Appendix.



Appendix

A-13,425

Date	Filings—Proceedings	Amount reported in emolument returns
5-24-57	Filed Complaint	
6- 4-57	Re Representation of Defendant by U. S. Attorney	J 53/29
6-24-57	Issued Summons	
6-27-57	Filed Summons	
“ “ “	“ Marshal's Return—6/25/57	
7- 2-57	“ Answer	
7-11-57	Filed Stipulation (Agreed Statement of Facts)	
7-11-57	M. O. Setting Time for filing briefs. Opening brief in 2 weeks or by 7/25/57. Answering brief to be filed 2 weeks thereafter or by 8/8/57 and reply brief 2 weeks after an- swering brief or by 8/22/57	
7-22-57	Filed Brief in Support of Plaintiff's Claim for Relief	
8- 1-57	Filed Stipulation (Defendant Granted an Extension within which to file Answer Brief (to Sept. 1, 1957))	
8-10-57	Filed Reply Brief of Defendant	
8-15-57	Filed Reply Brief of Plaintiff	
10- 4-57	“ Opinion	
10-28-57	Filed Judgment—dismissed w/o costs to either party J 55/213 case closed	3

Date	Filings—Proceedings	Amount reported in emolument returns
11-12-57	Filed Notice of Appeal (Copies)	5
11-12-57	Filed Bond for Cost on Appeal ((\$250.00—in bond file)	
12-18-57	Filed Motion to Extend Time to Docket Appeal	
12-20-57	Filed Order (time for docketing ap- peal extended to and including Jan. 31, 1958)	J 56/204
1-20-58	Filed Statement as Record on Appeal Earn. Dec. 31, '57 \$5.00	
3- 5-58	Filed Transcript of Record Ninth Circuit Court of Appeals)	
United States of America		
Territory of Alaska		
Third Division—ss.		

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 21st day of April, 1958.

Wm. A. Hilton,
Clerk of the District Court.
By Clara Rhodes, Deputy.

In the United States District Court
for the District of Alaska

Third Division

No. A-13,425

City of Anchorage, a municipal corporation,

Plaintiff,

vs.

Wm. A. Hilton,

Defendant.

NOTICE OF ENTRY OF JUDGMENT

To Mr. James M. Fitzgerald,
Attorney, City of Anchorage.

Please take notice that judgment in the above entitled cause was entered in the office of the Clerk of the above entitled court on the 28th day of October, 1957.

Dated at Anchorage, Alaska, this 4th day of November, 1957.

Wm. A. Hilton, Clerk,

By

Deputy.

United States of America
Territory of Alaska
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 21st day of April, 1958.

Wm. A. Hilton,
Clerk of the District Court.
By Clara Rhodes, Deputy.

No. 15,864

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

WILLIAM A. HILTON,

Appellee.

BRIEF FOR APPELLANT.

JAMES M. FITZGERALD,

City Attorney of the City of Anchorage,
Box 400, Anchorage, Alaska,

L. EUGENE WILLIAMS,

Assistant City Attorney of the City of Anchorage,

JOHN D. SHAW,

City Attorney of the City of Palmer,

EDWARD A. MERDES,

City Attorney of the City of Fairbanks,

SEABORN J. BUCKALEW,

City Attorney of the City of Seward,

Attorneys for Appellant.

FILED

APR 18 1958

PAUL P. O'BRIEN, CLERK



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Act of March 3, 1909, 35 Stat. 840	14, 16
Act of April 28, 1904, 33 Stat. 529	15, 16

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Alaska Compiled Laws, Annotated, 1949:

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No. 15,864

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

WILLIAM A. HILTON,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal taken from a final judgment in favor of the appellee, filed and entered in the district court for the Territory of Alaska, Third Judicial Division, on the 28th day of October, 1957.

The district court had jurisdiction in this proceeding by virtue of the provisions of the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 USCA Sec. 101. The United States Court of Appeals for the Ninth Circuit has jurisdiction of said appeal by virtue of the provisions of Sec. 1291 of Title 28 of the United States Code, (as amended October 31, 1951, c. 655, Sec. 48, 65 Stat. 726). This appeal is governed

by Sec. 1294 of Title 28, USCA, (June 25, 1948, c. 646, 62 Stat. 930, as amended October 31, 1951, 65 Stat. 727).

STATEMENT OF THE CASE.

The City of Anchorage is a municipal corporation of the first class, organized under and by virtue of the laws of the Territory of Alaska.

The defendant is now and at all times herein mentioned has been the duly appointed, qualified and acting clerk of the United States District Court, for the District of Alaska, Third Judicial Division.

The City filed a complaint wherein the appellant City claimed certain fine moneys paid as the result of a judgment after an appeal from the city court should be paid to the City of Anchorage. Defendant appellee answered the complaint, a stipulation was entered into, and both parties agreed that the case could be submitted to the district court upon briefs. Briefs were filed and after due consideration the district court filed an opinion and entered judgment against the appellant here, dismissing appellant's claim for relief. Thereafter, on the 12th day of November, 1957, the appellant City of Anchorage filed a notice of appeal. Counsel for appellant and appellee then prepared an agreed statement of the case as the record on appeal according to the provisions of Rule 76, Federal Rules of Civil Procedure. This is essentially a suit in the nature of mandamus brought to compel the defendant appellee to turn over certain fine moneys

collected after trial of city court appeal as is required by the laws of the United States and statutes of Alaska. Inasmuch as the pertinent facts in this case have been set out in the agreed statement in the record, and also have been repeated in the opinion entered by the district court as a part of that statement, no further facts will be set forth here.

SPECIFICATION OF ERRORS.

1. The court erred in holding it had no jurisdiction of this action.
2. The court erred in ruling fines imposed on city court appeal be retained by the Clerk of the Court.
3. The court erred in dismissing appellant's complaint.

ARGUMENT I.

THE COURT ERRED IN HOLDING IT HAD NO JURISDICTION OVER A SUIT TO RECOVER MONEY PAID TO THE CLERK OF THE COURT.

The district court stated in the opinion as alternate grounds why the complaint should fail, “. . . This court does not have jurisdiction over money paid to the clerk of the court upon a judgment of this court.” Supporting this statement, the court cited *Hill v. Valentine*, 164 F. 328. Even the district court indicated that the language quoted in the opinion in the *Hill* case was dicta (TR p. 7). An inspection of this case will show that the instant case can clearly be

distinguished. It is the appellant's contention that the statutes of the Territory of Alaska and the laws of the United States not only require the clerk to pay the fines to the City but it is doubtful whether the clerk had the authority to collect the fines imposed in the first place. This being the main argument of the appellant, it will be covered in a later portion of the brief. Though the *Hill* case has never been overruled, it has also never been cited by any other court. In this it is unique and peculiar to the Territory of Alaska. The language quoted by the district court to the effect that money that passes into the registry of the court can be legally paid out only under the authority of the government by its officers and agents in manners prescribed by statute is the main argument of the appellant here. In other words, it will be shown by the appellant's arguments that the statutes and rules and regulations made thereunder require that fines collected after appeal from the magistrate's court should be paid to the treasury of the City of Anchorage.

The court, in support of its holding that it had no jurisdiction over a suit as was brought here, cited the case of *D. B. Martin Co. v. Sannohouse*, 203 F. 517. In that case the court stated that the sole question was whether the money in the custody of this court is subject to attachment. To the same effect cited in the opinion *In re Stark*, 36 F. 2d 280 and *In re Chakos* 36 F. 2d 776, where court held that funds held in custodia legis were not subject to attachment or garnishment by the process of another court. The principles

stated in that case are well established and the appellant has no quarrel with these principles, however appellant is not attempting to reach funds in the registry of the court by virtue of garnishment, attachment or levy of execution which admittedly it could not do. Appellant urges and urged below in the district court that moneys collected after judgment for convictions for violations of City ordinances belong to the City of Anchorage, and such a disposition is provided both by statutes of the Territory of Alaska and by the laws of the United States. This is not a case where a claimant by virtue of process of one court is attempting to reach funds in the custody of another court. This is a suit in the nature of mandamus requiring the Clerk of the Court to follow the laws of the Territory and the United States and to pay moneys to the City of Anchorage in accordance with those laws.

The court in its opinion also had one other reference to jurisdiction, where the court said, “. . . While the legislature has authorized the City of Anchorage to codify a crime in its municipal ordinances and prosecute it in magistrate’s court, the Territory nevertheless retains jurisdiction over the crime by providing a trial de novo on appeal.” (TR p. 6.) It is urged that this statement is meaningless. Jurisdiction as defined by Black is, “The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) the court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision . . . ” It

cannot be questioned that the magistrate's court had jurisdiction to try violations of city ordinances, nor can it be questioned that the district court had jurisdiction to try the cause anew after an appeal from the decision of the magistrate's court. Thus we are unable to understand the meaning of the phrase that the Territory nevertheless retains jurisdiction over the crime.

Appellant submits that the district court erred in holding that it had no jurisdiction to try this action. Certainly the authorities cited by the court in the opinion are not applicable to the present factual situation.

ARGUMENT II.

THE COURT ERRED IN HOLDING THAT BECAUSE AN APPEAL FROM A JUDGMENT OF THE MAGISTRATE'S COURT IS A TRIAL DE NOVO, THAT THE FINES IMPOSED AS A RESULT OF THE JUDGMENT OF THE DISTRICT COURT HAD NO RELATION TO THE FINES IMPOSED BY THE CITY.

In reading the opinion in this case, it is difficult to determine what the court is actually holding. Is the court saying that because the trial on appeal is a trial de novo the fines imposed as the result of the judgment of the district court are to be collected and retained by the clerk of the court, It remains that the district court in its opinion denied appellant the relief it sought, which was the return of a certain fine paid as the result of a conviction after an appeal from the judgment of the magistrate's court. The district judge, citing Section 16-1-70 ACLA 1949 and other authorities, indicates in his opinion that, "Upon a

judgment on appeal after trial de novo, the judgment of the magistrate's court was vacated and appellant was then in the same position as if he had never been tried in that court." (TR p. 6.)

Appellant has no quarrel with the proposition that a trial on appeal is a trial de novo, nor did it have any objection to this premise in the court below. It is urged however that merely because the trial on appeal is a trial de novo it is not a logical extension that the fines imposed then should be collected and retained by the clerk of the district court.

Appeals are brought to the district court by virtue of Section 16-1-70 ACLA 1949. Appellee's position indicates that this section merely gives the procedural right of appeal from the magistrate's court to the United States District Court. Whether this is a procedural or substantive right does not appear to be material, but it is a statutory right of appeal from judgments of the magistrate's court. It is elementary that upon completion of any appellate procedure, the lower court lacks jurisdiction to proceed further until disposition is made by the appellate court.

Section 16-1-70, ACLA 1949 also says:

" . . . and appeals shall lie from his judgments to the district court in the same manner as appeals from the judgments of the justice of the peace."

This perhaps is an unfortunate procedure, but was used as a convenient method of providing an appellate procedure without drafting new legislation. The trial

in the district court is to determine whether or not the person accused is guilty of having violated a city ordinance. Presumably, the district court is bound by the ordinances, including the maximums provided for punishment for violation of the ordinances.

The appellee urged below that said cause on appeal is tried and determined anew as in Section 68-9-10, ACLA 1949. It should be noted that this section applies to civil suits appealed from the justice court. The section applicable to criminal appeals from the justice court is found at 69-6-8, ACLA 1949. The language of the latter is substantially different. Though allowing amendment of pleadings, there is not found the language “. . . and the action should be deemed pending and for trial therein as if originally commenced in such court . . . ”, as is contained in the section applicable to civil appeals. However, the trial de novo theory of criminal appeal apparently has been adopted by judicial decisions. (*United States v. Myers*, 2 A. 158; *United States v. Sharp*, 6 A. 408; *Jorge, Application of*, 10 A. 633, 639.)

In *United States v. Alexander*, found at 7 A. 28, we find that the appellate jurisdiction of the district court is dependent upon the original jurisdiction. In other words, if the district court were to try a city court appeal wherein the city had no jurisdiction over the offense, even though the trial is de novo and the district court might have jurisdiction over the same offense, there would be no proper proceedings in the district court because the jurisdiction in the appellate case is derivative.

Under the section appellee referred to below as requiring a trial de novo, *Pollard v. Booth Fisheries Co.*, 6 A. 287, is cited. This case apparently limits the de novo theory to its proper bounds. Under a statute of Alaska in effect at that time, plaintiff could only recover costs where he recovered judgment of \$50.00 or more in the district court. It was urged in the *Pollard* case, *Ibid.*, that even though an appeal was from justice court, and the statute required it to be tried de novo, the eventual judgment was a judgment of the district court and the statute allowing costs was applicable. This closely parallels appellee's theory that after trial and conviction in the district court the judgment is a district court judgment and the clerk is entitled to collect the fine. Presumably also based on the theory that this is so because it is a trial de novo.

From an Oregon case, *Nurse v. Justus*, 6 Oreg. 75, Pacific States Report Book 38, involving a similar problem, the court in the *Pollard* case quoted the following language:

"An appeal, though tried anew, cannot be regarded as a matter so entirely independent of the original action as to permit the application in an action originally in the circuit court. It is not a new action, but simply a retrial of an action in an appellate tribunal for the purpose, theoretically, of correcting errors of the inferior court."

The court ruled that as plaintiff in the court below would have been entitled to costs, regardless of the fact that it was a trial de novo in the district court,

he would be entitled to costs because it was an appellate procedure although had it been commenced in district court, a recovery of \$50.00 was needed to be entitled to costs.

The de novo theory apparently relied on by the court as one of the bases of denying appellant relief is not an omnipotent device capable of changing the character of a proceeding. There are limitations as to its magic. Judge Folta had occasion to deal with these limitations in the case of *City of Anchorage v. Anderson*, 13 A. 413. The question presented in that case was whether or not an appeal from the city court could be dismissed on appellant's failure to appear for trial. Defendant in that case argued that since the trial on appeal was de novo, it must be dealt with as though originating in the district court and a dismissal would be tantamount to a conviction without a trial. " . . . (1, 2) I am of the opinion that this contention cannot be sustained. A trial de novo does not require that the case be treated in all respects as though it originated in the appellate court." (Court citing cases.) The court also said, "Moreover, the provision of Section 69-6-9, quoted, itself negatives the view that the case must be treated as though it originated in the District Court."

Relying on the previous case cited, it does not seem logical that because a trial is one to be tried de novo that this fact should have any bearing on the disposition of the fine imposed for violation of the city ordinance. Appellant submits then that because a trial of an appeal from the city magistrate's court is a trial

de novo this has little or no bearing on the question of the disposition of the fines imposed and collected for violations of city ordinances. The de novo theory governs the procedure and not the substance of the case.

ARGUMENT III.

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S ACTION AND THEREBY DETERMINING THAT FINES IMPOSED ON A CONVICTION AFTER AN APPEAL FROM THE JUDGMENT OF THE MAGISTRATE'S COURT BE RETAINED BY THE CLERK OF THE COURT.

The district court in its opinion (TR p. 5) did little to shed light on the question of statutory interpretation concerning the disposition of the fines here involved. In the brief submitted to the district court it is believed that the statutes of the Territory of Alaska and the laws of the United States involved were fully presented. It is further contended that the materials submitted required a determination based on the statutory construction and interpretation. It is obvious from reading the court's opinion that nothing was settled nor were the pertinent statutes even mentioned.

The appellant's position is that a reading of the statutes involved requires that the fines be paid to the City. There are two basic statutes involved which may or may not be opposed to each other. These are set out more fully in the appendix to this brief. The first one is Section 54-4-5, ACLA 1949, also found iden-

tically in Section 106, Title 48 USCA. Both sections set forth essentially the duties of the Clerk of the Court. The other statute involved in this determination is 16-1-35, ACLA 1949. In 54-4-5 ACLA 1949 or in Section 106, Title 48 USCA, we find the following language: “. . . He shall also collect and receive all moneys arising from the fees of his office, from licenses, fines, forfeitures, judgments, or on any other account authorized by law to be paid to or collected by him, and shall apply the same . . . ” Obviously the word “fines” is used in the general sense. It is the appellant’s contention that “fines” in this first section refers to fines where they may be imposed for violations of Federal or Territorial law. As to what is to be done with the money collected by the Clerk of the Court, and which would have a bearing on the meaning of the word “fines”, or at least as to the disposition of the fines, we find the language, “. . . and any other moneys the disposition of which is otherwise specially provided for by law, shall not be available for the expenses of the court, but shall be paid over or deposited as provided by law for other districts.” In all cases, whether the trial is de novo or otherwise, the fine that is imposed is a fine imposed for the violation of a city ordinance. The appellant believes the controlling statute in this instance is 16-1-35, ACLA 1949, the pertinent portion of which is “. . . All fines and costs imposed and collected for violation of municipal ordinances shall belong to the municipality and be paid over to its Treasury.” It should be noted that there is no limiting language in this section pro-

viding that after appeal fines are to be collected or paid to the Clerk of the Court, or belong to the United States, nor does this section say "collected by the municipality."

Appeals are brought to the district court by virtue of 16-1-70 ACLA 1949. The pertinent portion of this section says: "The municipal magistrate shall have jurisdiction of all actions for violation of municipal ordinances and appeals shall lie from his judgments to the district court in the same manner as appeals from the judgments of a justice of the peace." This perhaps is an unfortunate procedure but was used as a convenient method of providing an appellate procedure from the magistrate's court to the district court without drafting new legislation. It was unfortunate in the sense that it left unsolved or clearly defined the collateral problems of (1) disposition of the fines, (2) who are the proper parties to prosecute the appeal, and (3) whether or not the defendant would be entitled to a jury trial in the appellate court or the district court. This action was brought against the clerk of the district court in hopes of solving at least one of those problems, that is, the disposition of the fine money. However, the district court sought only to rid itself of the action and not to solve the problem. Both the appellant and the appellee dealt with the statutes involved, and cited cases bearing on the subject. Apparently the district court chose to ignore these citations and made no mention of the statutes involved in its opinion, thus it was felt necessary to bring this appeal to this court.

As already indicated, one of the main issues seems to be whether or not the provisions of 16-1-35 ACLA 1949 conflict with the provisions of 54-4-5 ACLA 1949 or Section 106, Title 48. It is the appellant's contention that these two statutes do not conflict. It is felt necessary to trace the history of Section 106 of Title 48. The annotations under the section indicate that the original act of Congress was the Act of June 6, 1900. (31 Stat. 321, Sec. 7.) Page 324 sets out the duties of the clerk. The pertinent portion of Section 7 is as follows: "He shall receive all moneys collected from licenses, fines, and forfeitures or any other case except for violation of the customs laws and shall apply the same to the incidental expenses of the proper division of the district court and the allowance thereof is directed by the judge." This entire Section 7 is to be found in the appendix.

This act was then amended by congress in the Act of March 3, 1909 (35 Stat. 840) wherein we find the following pertinent language: "He shall also collect and receive all moneys arising from the fees of this office, from licenses, fines, forfeitures, judgments or any other account by law authorized to be paid to or collected by him and shall apply the same except" As to the disposition of moneys by the clerk, we find the following, " . . . and any other moneys, the disposition of which is otherwise specially provided for by law shall not be available for the expenses of the court but shall be paid over or deposited as provided by law for other districts."

This section very closely follows the provisions of Section 106, Title 48. Appellant's contention is that significant in the amendment is the language found for the first time, " . . . and any other moneys, the disposition of which is otherwise specially provided for by law, shall not be available for the expense of the court, but shall be paid over or deposited as provided by law for other districts." There must have been a reason for addition of this language.

In between these two acts providing for civil government and in setting forth the duties of the clerk of the court, Congress passed in 1904, Chapter 1778, found at 33 Stats. 529, an act to amend and clarify the laws relating to municipal corporations in the District of Alaska. Pertinent portions of this act of Congress are found at page 532, and we quote as follows: " . . . the cost of such imprisonment shall be borne by the municipality and not by the United States. All fines and costs imposed and collected for violation of municipal ordinances shall belong to the municipality and be paid over to its Treasurer. The municipal magistrate shall have jurisdiction over all actions for violation of municipal ordinances and appeals shall lie from his judgments to the District Court in the same manner as appeals from the judgments of ex officio justices of the peace." Essentially the same language is found in 16-1-35, ACLA 1949, arrived at after successive codification. The first act prescribing the duties of the District Court was passed in 1900, 31 Stats. 321. At that time there was no

authority delegated to cities to provide for a municipal court or to impose fines and sentences for violations of city ordinances. The power to incorporate and pass such ordinances was given to cities under an act of April 28, 1904, found at 33 Stats. 529. The original act providing for the duties of the Clerk of the Court, when amended by the Act of March 3, 1909, 35 Stat. 840, expanded these duties and we find the significant language “. . . and other moneys, the disposition of which is otherwise specially provided for by law.” Appellant urges this statute contemplated paying certain moneys and in this case, fine moneys collected after appeal from the city court, to the city or there would be no reason for the new language in the later statute. If the statutes are construed together and thus read, there is no conflict between the provisions of 16-1-35 and Section 106, Title 48. It is urged that there is specific language in 16-1-35 ACLA 1949, (originally enacted by Congress) providing that fines imposed for violations of municipal ordinances belong to the municipality. In opposition to this there is no general statute providing that all fines belong to the United States where imposed in the district court. The only statute that can be pointed to is the statute setting out the duties of the Clerk of Court and the language of Section 106, Title 48, USCA indicates that some moneys in the hands of the clerk of the court may be disposed of as provided for by law.

A case that closely parallels the situation here is *City of Maysville v. Key*, 247 S.W. 374. In that case

a suit was brought against the Clerk of the Circuit Court to recover a fine and costs assessed against the defendant found guilty on an appeal from a police court. The trial in that case was also a trial de novo. The court in that case quoted language of Kentucky Statutes under powers of municipalities of the third class, the intent of which is very similar to ours, providing that fines and forfeitures recovered in the magistrate's court be paid to the treasurer of the city. In the Kentucky case the violation was a violation of state law tried in the city court. The court in that case reasoned that where a case arose in the police court, although appealed to the circuit court, a city of the third class was entitled to recover fines assessed after the conclusion of the appellate case. It is urged that in the instant case the position of the city is stronger in that the particular prosecution is not commenced for violations of Territory or Federal law, but is commenced for violations of city ordinances. Kentucky Statutes further provided that fines and forfeitures recovered in the magistrate's court be paid to the treasury of the city. In the present situation, we are not limited by the language "collected by the magistrate" but the statute clearly says, "all fines imposed and collected for violations of city ordinances belong to the city." A plain reading of the statutes involved would certainly indicate that the city is entitled to fines whether the trial be in the magistrate's court or the district court.

For further authority on the general question of the disposition of fines, see the following: *Cherokee*

County v. Cunningham, 68 So. 2d 507; *Ivester v. Mozeley*, 80 S.E. 2d 197; *Delta County v. The City of Gladstone*, 8 N.W. 2d 908; *State v. Bosworth*, 52 Atlantic 423.

In *State v. Bosworth*, 52 Atl. 423 where appeals from city court were taken as provided by statute in the same manner as appeals from justice court (as in Alaska), the court held fines under Vermont law belong to the state. But in that case, it should be noted that under Vermont statutes, specific language provided that in all cases appealed and entered in that county court, the fines and costs imposed belong to the state. There is no such specific language in Alaska statutes or applicable Federal law.

CONCLUSION.

Appellant submits that the district court had jurisdiction to try this action, and further that because a trial on an appeal from city court is tried de novo and the judgment is a judgment of the district court, this has little or no bearing on the disposition of the fine money.

As the cities of the Territory grow larger and the case load in each city court increases, so do the cases appealed to the district court. It is inconceivable that Congress and the Legislature in its wisdom, meant that fines imposed for violations of city ordinances should belong to anyone but the city concerned. Orderly regulation and enforcement of municipal ordinances re-

quires a magistrate's court; the appellate procedure protects the rights of the accused; it would seem logical and equitable that the municipality enforcing these laws should be entitled to the fines as at least a partial compensation for enforcing law and order within its boundaries.

Wherefore, appellant prays that the judgment of the district court be reversed.

Dated, Anchorage, Alaska,
March 28, 1958.

Respectfully submitted,

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(Appendix Follows.)

Appendix.



Appendix

STATUTES CITED IN BRIEF.

ACLA 1949

Section 16-1-35 POWERS OF COUNCIL:

“ . . .

“Twelfth. (Penalty for violation of ordinances.) To prescribe the punishment for the violation of any municipal ordinance, but such punishment shall not exceed in any case a fine of One Hundred Dollars (\$100.00) or imprisonment in a municipal jail of thirty days, or both, in the discretion of the court, together with the costs of prosecution, Provided: That a judgment that the defendant pay a fine may also direct that he be imprisoned in the municipal jail until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two dollars of the fine; and in case the entry of judgment should omit to direct the imprisonment and the extent thereof, the judgment to pay the fine shall operate to authorize and require the imprisonment of the defendant until the fine is satisfied at the rate above mentioned. All fines and costs imposed and collected for violation of municipal ordinances shall belong to the municipality and be paid over to its Treasury.”

ACLA 1949

Section 16-1-70 OFFICERS AND EMPLOYEES:

“JURISDICTION AND PROCEEDINGS: COSTS:
JUDGMENT AND ENFORCEMENT OR REVIEW

OF SAME. The municipal magistrate shall have jurisdiction of all actions for violation of municipal ordinances and appeals shall lie from his judgments to the district court in the same manner as appeals from the judgments of a justice of the peace. The rules of proceeding before a municipal magistrate shall be as near as practicable the same as before a justice of the peace, unless otherwise prescribed by ordinance enacted by the council. The council may also by ordinance prescribe the costs to be taxed in proceedings before the municipal magistrate.

A judgment in the court of a Municipal Magistrate shall be enforced in the same manner as provided by law for the enforcement of judgments in the court of a Justice of the Peace. Executions shall be addressed to the Chief of Police or any police officer of the city and the levy thereof, as well as all other proceedings thereunder, shall be the same as in the court of a Justice of the Peace.” (L 1923, ch 97, Sec. 24, p. 204; am L 1927, ch 61, Sec. 1, p. 126; L 1929, ch 5, Sec. 1, p. 29, effective March 26, 1929; CLA 1933 Sec. 2399.) Cases cited under notes of decisions: Bruno Munro, In re (1901), 8 A 264; Fairbanks v. Drayton (1931), 8 A 264; Nome v. Reed (1901), 1 A 395; Guidoni v. Wheeler (CCA 9th 1916) 230 F. 93, 144 CCA 391.

ACLA 1949

Section 54-4-5. NUMBER OF CLERKS: DISPOSITION OF FUNDS: ASSISTANTS.

Four clerks shall be appointed for the court, one of whom shall be assigned to each division thereof, and

during his term of office shall reside at such place in the division as the Director of Administrative Office of the United States Courts may direct. Each clerk shall, in his division of the district perform the duties required or authorized by law to be performed by clerks of United States courts in other districts, and such other duties as may be prescribed by the laws of the United States relating to the district of Alaska. He shall preserve copies of all laws applicable to the district and shall preserve all records and record all proceedings and official acts of his division of the court. He shall also collect and receive all moneys arising from the fees of his office, from licenses, fines, forfeitures, judgments, or on any other account authorized by law to be paid to or collected by him, and shall apply the same, except the money derived from licenses and fines imposed for failure to pay license taxes, to the incidental expenses of the proper division of the district court and the allowance thereof as directed in written orders, duly made and signed by the judge, and shall account for the same in detail, and for any balances on account thereof, under oath, quarterly, or more frequently if required, to the court, the Director of Administrative Office of the United States Courts, and the Secretary Administrative Office of the United States Courts, and the Secretary of the Treasury; Provided, that fines imposed and collected for failure to pay license taxes shall be disposed of as provided by law for the disposition of such license taxes; and moneys accruing from violations of the customs laws, civil customs cases, or internal-revenue

cases, moneys, not including costs, accruing from civil post-office suits, fines in criminal cases for violations of the postal laws, the net proceeds of sales of public property under section 487 of Title 31 (USC) and any other moneys the disposition of which is otherwise specially provided for by law, shall not be available for the expenses of the court, but shall be paid over or deposited as provided by law for other districts. And after all payments ordered by the judge shall have been made, any balances remaining in the hands of the clerk shall be by him deposited to the credit of the United States at such times and under such rules and regulations as the Secretary of the Treasury may prescribe. The clerk shall be ex officio recorder of instruments as hereinafter provided and also register of wills for the division, and shall establish secure offices for the safekeeping of his official record where terms of his division of the court are held. He may appoint necessary deputies and employ other necessary clerical assistance to aid him in the expeditious discharge of the duties of his office, with the approval of the court or judge, and, subject to the approval of the Director of the Administrative Office of the United States Courts, fix the compensation of such deputies and the compensation for such clerical assistance. Any person so appointed or employed shall be paid by the clerk on the order of the judge, as other court expenses are paid. (31 Stat 324; 35 Stat 840; CLA 1931, Sec. 367; CLA 1933, Sec. 1097; am 53 Stat 1223; 54 Stat 384; June 25, 1948, ch 646, Sec. 10, 62 Stat, effective September 1,

1948; 48 USC Sec. 106.) Cases cited under notes of decisions, *In re Dalton* (1932) 8 A 338; *In re Hill's Bottling License* (1902) 1 A 436; *In re Dalton* (1932) 8 A 332; *Hills v. Valentine* (CCA 9th 1908) 164 F 328, 90 CCA 260; *Statter v. United States* (CCA 9th 1933) 66 F2d 819.

31 Stats. 786, Sec. 7 p. 324.

**“AN ACT MAKING FURTHER PROVISION
FOR A CIVIL GOVERNMENT FOR ALASKA,
AND FOR OTHER PURPOSES.**

Sec. 7. Three clerks shall be appointed for the court, one of whom shall be assigned to each division thereof, and during his term of office reside at the place designated for the residence of the judge of such division. Each clerk shall, in his division of the district, perform the duties required or authorized by law to be performed by clerks of United States courts in other districts, and such other duties as may be prescribed by the laws of the United States relating to the district of Alaska. He shall preserve copies of all laws applicable to the district and shall preserve all records and record all proceedings and official acts of his division of the court. He shall also receive all moneys collected from licenses, fines, forfeitures, or in any other case, except from violations of the customs laws, and shall apply the same to the incidental expenses of the proper division of the district court and the allowance thereof as directed by the judge, and shall account for the same in detail and for any balances on account thereof quarterly to and under

the direction of the Secretary of the Treasury. He shall be ex officio recorder of instruments, as hereinafter provided, and also register of wills for the district, and shall establish secure offices where terms of his division of the court are held for the safe-keeping of his official records."

33 Stats. 1778, Sec. 10 p. 532.

**"AN ACT TO AMEND AND CODIFY THE LAWS
RELATING TO MUNICIPAL CORPORATIONS
IN THE DISTRICT OF ALASKA.**

Tenth. To prohibit drunkenness, gambling, houses or places of ill-fame, disorderly conduct, or conduct endangering the public peace, public health, or public safety, to define such offenses, and to prescribe the punishment therefor, but such punishment shall not exceed in any case a fine of one hundred dollars or imprisonment in the municipal jail not exceeding ninety days, or both, in the discretion of the court, together with the costs of prosecution. The costs of such imprisonment shall be borne by the municipality and not by the United States. All fines and costs imposed and collected for violation of municipal ordinances shall belong to the municipality and be paid over to its treasurer. The municipal magistrate shall have jurisdiction of all actions for violation of municipal ordinances, and appeals shall lie from his judgments to the district court in the same manner as appeals from the judgments of ex officio justices of the peace."

35 Stats. 269, Sec. 3 p. 840.

“AN ACT TO AMEND SECTION EIGHTY-SIX OF AN ACT TO PROVIDE A GOVERNMENT FOR THE TERRITORY OF HAWAII, TO PROVIDE FOR ADDITIONAL JUDGES, AND FOR OTHER JUDICIAL PURPOSES.

Sec. 3. That section seven of said chapter one of title one is hereby amended so as to read as follows:

‘Sec. 7. That four clerks shall be appointed for the court, one of whom shall be assigned to each division thereof, and during his term of office shall reside at such place in the division as the Attorney-General may direct. Each clerk shall, in his division of the district perform the duties required or authorized by law to be performed by clerks of United States courts in other districts, and such other duties as may be prescribed by the laws of the United States relating to the district of Alaska. He shall preserve copies of all laws applicable to the district and shall preserve all records and record all proceedings and official acts of his division of the court. He shall also collect and receive all moneys arising from the fees of his office, from licenses, fines, forfeitures, judgments, or on any other account authorized by law to be paid to or collected by him, and shall apply the same, except the money derived from licenses, to the incidental expenses of the proper division of the district court and the allowance thereof as directed in written orders, duly made and signed by the judge, and shall account for the same in detail, and for any balances on account thereof, under oath, quarterly, or more frequently if

required, to the court, the Attorney-General, and the Secretary of the Treasury: PROVIDED, that moneys accruing from violations of the customs laws, civil customs cases, or internal-revenue cases, moneys, not including costs, accruing from civil post-office suits, fines in criminal cases for violations of the postal laws, the net proceeds of sales of public property under section thirty-six hundred and eighteen, Revised Statutes as amended, and any other moneys the disposition of which is otherwise specially provided for by law, shall not be available for the expenses of the court, but shall be paid over or deposited as provided by law for other districts. And "after all payments ordered by the judge shall have been made, any balances remaining in the hands of the clerk shall be by him deposited to the credit of the United States and be covered into the Treasury of the United States at such times and under such rules and regulations as the Secretary of the Treasury may prescribe. The clerk shall be ex officio recorder of instruments as hereinafter provided and also register of wills for the division, and shall establish secure offices for the safe-keeping of his official records where terms of his division of the court are held. He may appoint necessary deputies and employ other necessary clerical assistance to aid him in the expeditious discharge of the duties of his office, with the approval and at compensation to be fixed by the court or judge, subject to the approval of the Attorney-General. Any person so appointed or employed shall be paid by the clerk on the order of the judge, as other court expenses are paid." " "

ACLA 1949

Section 69-6-8

“WHEN APPEAL DEEMED PERFECTED:
AMENDMENT OF PLEADINGS.

That from the filing of the transcript with the clerk of the district court the appeal is perfected, and the action is to be deemed pending therein and for trial upon the issue tried in the justice's court. The appellate court has the same authority to allow an amendment of the pleadings on an appeal in a criminal action that it has on an appeal in a civil action. (CLA 1913, Sec. 2558; CLA 1933, Sec. 5848.)”

ACLA 1949

Section 69-6-9

“JUDGMENT ON APPEAL.

That when an appeal is dismissed the appellate court must give judgment as it was given in the court below, and against the appellant, for the costs and disbursements of the appeal. When judgment is given in the appellate court against the appellant, either with or without trial of the action, it must also be given against the sureties in his undertaking according to the nature and effect thereof. (CLA 1913, Sec. 2559; CLA 1933, Sec. 5849.)”

No. 15,864

IN THE

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

WILLIAM A. HILTON,

Appellee.

BRIEF OF APPELLEE.

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Appellant,

vs.

WILLIAM A. HILTON,

Appellee.

BRIEF OF APPELLEE.

JURISDICTION.

This Court is without jurisdiction to entertain this appeal for the reason that it was not taken from the initial decision in the case and not timely filed. The opinion and decision of the District Court filed and entered on the fourth day of October, 1957, was final and decisive, and is set forth on pages 5-7 of the transcript. Another judgment was thereafter filed and entered on the 28th day of October, 1957. (TR 8.) The decision of October 4, 1957, with its decisive determination, namely, "plaintiff's action is dismissed", constituted a final disposition of the case making any further judgment unnecessary, and appeal should have been taken from that judgment and

filed not later than the 4th day of November, 1957. Instead appeal was taken from the judgment of October 28, 1957, and notice of appeal from that judgment filed November 21, 1957, was too late. Directly in point is *Grace M. Matteson v. United States of America*, 240 Fed.2d 517.

Without waiving the foregoing objections to the jurisdiction of the Appellate Court to entertain this appeal, appellee answers the brief of appellant as follows:

STATEMENT OF THE CASE.

Appellee objects to that part of the statement as made by the appellant appearing on page 3 of its brief in lines 1, 2 and 3 after the word "appeal" consisting of the words "as is required by the laws of the United States and statutes of Alaska", on the ground that the relief sought by the appellant is not required by the laws of the United States or the statutes of Alaska.

ARGUMENT.

The three points, or specifications of errors, advanced by the appellant may be reduced to two simple propositions, namely: (1) The status of a case appealed from the Magistrate's Court to the District Court, and (2) The disposition of a fine imposed by the District Court in such a case.

1. AS TO THE STATUS OF SUCH A CASE.

There is no claim that the appeal by Samuel Austin, wherein the fine here in question was imposed, was in anywise defective. Therefore, the District Court acquired jurisdiction in that case pursuant to the provisions of sections 16-1-70, 69-6-1, 69-6-4, 69-6-8 and 69-6-9, ACLA 1949.

The ultimate determination of the issue is dependant upon the construction to be placed upon section 69-6-8, ACLA 1949, and sections 106 and 107 of Title 48, USC, as amended, which last two sections are found verbatim in sections 54-4-5 and 54-4-7, ACLA 1949.

Section 69-6-8, ACLA 1949, has been construed by the District Court of Alaska in the cases of *United States v. Meyers*, 2 Alaska 158, *United States v. Smith*, 6 Alaska 472, *Application of Jorge*, 10 Alaska 633, and *Coutier v. United States* (Appeal from District Court of Alaska, Second Division) 148 Fed. 804.

In *United States v. Meyers*, supra, the District Court of Alaska, First Division, said:

“The case is here on appeal and not on a writ of error, or in any way whereby the errors of the court below are reviewable. The case is tried here de novo, as if originally initiated in this court.”

In *United States v. Smith*, supra, the District Court of Alaska, First Division, said:

“In the case at bar, this court has original jurisdiction of the subject matter of the action. The rule, as I understand it, is that a trial de novo is an exercise of original jurisdiction, and, al-

though no proper appeal is taken, if the parties appear and become subject to the jurisdiction of the court, all irregularities of attempted appeal are waived, and the court has jurisdiction of the subject matter."

In *Application of Jorge*, supra, the District Court of Alaska, Third Division, said:

"Under Alaska law, when an appeal is taken from judgment of the justice court, in criminal action, the cause is tried de novo in district court and all errors of every nature which may have occurred in the justice court are automatically corrected in the district court."

In *Coutier v. United States* (appeal from District Court, Second Division, Alaska) supra, the United States Court of Appeals, Ninth Circuit, said:

"Proceedings taken by a defendant convicted of a criminal offense before a commissioner in Alaska, as ex-officio justice of the peace, for perfecting an appeal, held sufficient and to require the district court to try the case anew under code of criminal procedure Alaska."

Besides the Alaska cases above cited and quoted, it is well established in other jurisdictions that a trial de novo in an Appellate Court is a trial as if no action whatever had been instituted in the court below. *Burnstein v. Millikin Trust Co.*, 113 N.E. 2d 339. *Archer v. High*, 9 So.2d 647, 648. *Lott v. Ill. Central R.R. Co.*, 10 So.2d 96. *State v. Kool*, 140 Pac.2d 737. *Hall v. McKee*, 179 S.W.2d 590. *In re Betts Estate*, 119 N.E.2d 801, 805. *State ex rel. Sachta v. District Court*, 283 Pac.2d 1023, 1024.

In 31 *Am. Jur.* 773 the doctrine is stated in the following language:

“Where the effect of the appeal is to transfer the entire record to the appellate court for a retrial as though originally brought therein, the judgment appealed from is completely annulled, and is not, therefore, available for any purpose. The record below is as though never made.”

2. AS TO THE DISPOSITION OF FINES IMPOSED BY THE DISTRICT COURT IN CASES APPEALED FROM A MAGISTRATE'S COURT.

The District Court of Alaska having acquired original jurisdiction in the *Austin* case and having fined the defendant the sum of \$100.00 and the Clerk having collected that fine, the disposition of the fine is controlled by the laws and rules governing the District Court of Alaska and *not those applicable to the Municipal Courts of the Territory*. The controlling law is found in sections 106 and 107 of Title 48, USC, as amended, and appearing verbatim in section 54-4-5 and 54-4-7, ACLA 1949.

Amended section 106 of Title 48, USC, in mandatory language requires the clerk of the District Court to collect and receive all moneys arising from the fees of his office, licenses, *finer*, forfeitures, judgments and on any other account authorized by law to be paid to or collected by him, and in like language, requires him to apply the same to the incidental expenses of the District Court.

Amended section 107 of Title 48, USC, also, in mandatory language, requires the clerk to collect all money arising from the fees of his office or on any other account authorized by law to be paid to or collected by him, and shall report the same and the disposition thereof in detail to the Court, Director of the Administrative Office of the United States Courts and the Secretary of the Treasury, and also requires that all public money received by the Clerk of the District Court shall be paid out by him on the order of the Court and any balance remaining in his hands after all payments ordered by the Court shall have been made shall be by him covered into the Treasury of the United States at such time as the Secretary of the Treasury shall prescribe.

The very question herein involved was submitted by the Director of the Administrative Office of the United States Courts to the Comptroller General of the United States. In his communication of November 20, 1956, to the Director of the Administrative Office of the United States Courts (unreported as far as known to the writer of this brief) the Comptroller General said:

“In a letter of October 18, 1956, from the Acting Director, a request was made for our views regarding the disposition of fines collected in cases appealed to the District Court of Alaska from a city magistrate. The Manager for the city of Anchorage asserts that such fines, which were imposed originally in the local magistrate's court, should be deposited in the city treasury. A contrary view is advanced by the clerk of one of the

divisions of the District Court, who expresses the view that under the law such fines should be handled as other moneys received by him.

Title 48, United States Code, section 106 specifically provides that '*finer imposed for failure to pay license taxes*' which are collected by the clerks of the District Court of Alaska are not to be applied to incidental expenses of the District Court but that '*finer imposed and collected for failure to pay license taxes shall be disposed of as provided by law for the disposition of such license taxes.*'

The italicized language was enacted by the act of June 13, 1940, 54 Stat. 384. The legislative reports on that act show that license moneys to carry on a business, trade, or occupation in an incorporated town in Alaska are paid over to the treasurer of the town for school and municipal purposes [35-1-52, Alaska Compiled Laws]; and that moneys from license fees to carry out such pursuits outside incorporated towns are deposited into the United States Treasury in the Alaska fund and used for schools, relief, and roadway purposes [35-1-51, Alaska Compiled Laws]. The reports further show that where business was carried on without a license, while fines equal or in excess of the license fees were provided for and collected, the moneys were not applied to the benefit of the local communities but used for the incidental expenses of the District Court. The Congress provided that the fines—which in one sense represented taxes—should be made available for the benefit of the Territorial and municipal governments. Fines arising from failure to pay such license fees collected by the clerks of the

District Court of Alaska—and without regard to whether the proceeding in the District Court is an original action or an appeal from a magistrate's court—are required to be so treated. However, it is assumed that the fines, the disposition of which is in dispute, are assessed for reasons other than the failure to secure business and professional licenses, the question being as to whether such other fines in cases appealed from a city magistrate are to be deposited in 'Fund C' established pursuant to 48 U.S.C. 106—available for incidental expenses of the proper division of the District Court, the balance to be credited to the United States—or are to be turned over to the treasury of the involved city for municipal purposes.

Section 3 of the act of August 24, 1912, 37 Stat. 512—the act which created the Legislature of the Territory of Alaska—provides that the Constitution of the United States and all laws thereof not locally inapplicable shall have the same force and effect as elsewhere in the United States and that the legislature shall pass no law depriving the judges and officers of the District Court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States. Section 9 of that act limits the legislative power of the Territory to lawful subjects of legislation not inconsistent with the Constitution and laws of the United States and provides that all laws passed by the Territory inconsistent with that section shall be null and void. While the act of August 29, 1914, 38 Stat. 710, provides that nothing in the act of August 24, 1912, shall be construed to prevent courts within

their jurisdictions in the Territory from enforcing Laws passed by the Territorial legislature within the powers conferred upon it by the Congress nor prevent the legislature from passing laws imposing additional duties on clerks of the District Court and certain other judicial officers, the legislature of the Territory could not properly pass a law inconsistent with the laws of the United States, of which 48 U.S.C. 106 is, of course, a part. That section of the code provides that a clerk of the District Court shall collect 'all moneys arising from the fees of his office, from licenses, fines, forfeitures, judgments, or on any other account authorized by law to be paid to or collected by him, and shall apply the same, except the money derived from licenses and fines imposed for failure to pay license taxes, to the incidental expenses of the proper division of the District Court' [with certain exceptions not here material] and 'any balances remaining in the hands of the clerk shall be by him deposited to the credit of the United States.' A requirement that the District Court pay over fines of the character here involved to a municipality for municipal purposes is, of course, inconsistent with 48 U.S.C. 106 making fines of the District Court available for the incidental expenses of the court and requiring any balance to be deposited into the Federal treasury (Federal purposes) and would be beyond the scope of the authority of the Territorial legislature and null and void.

The contentions of the Manager of the city of Anchorage, that fines collected by the District Court on appeal from a city magistrate's fine

should be paid to the town, are based upon section 16-1-35 of the Alaska Compiled laws, as amended by 44 S.L.A. 1953, laws of the Territorial legislature. The section involved deals with powers of city councils of first-class cities in Alaska and provides for penalties for violation of municipal ordinances. It is therein provided 'all fines and costs imposed and collected for violation of municipal ordinances shall belong to the municipality and be paid over to its Treasury.' Municipal magistrates for first-class cities are provided for in section 16-1-67 to 70 of the same code, it being provided in the last section that:

' * * * The municipal magistrate shall have jurisdiction of all actions for violation of municipal ordinances and appeals shall lie from his judgments to the district court in the same manner as appeals from the judgments of a justice of the peace. * * * '

Information concerning appeals from judgments of a justice of the peace is found in Titles 67 through 69, inclusive of the Alaska Compiled Laws. Title 68 concerns 'Civil Procedure' and Title 69 pertains to 'Criminal Procedure.' At Section 68-9-10 we find—

'When appeal perfected: Trial de novo. Upon the filing of the transcript with the clerk of the district court the appeal is perfected, and the action shall be deemed pending and for trial therein as if originally commenced in such court, and the district court shall proceed to hear, try, and determine the same anew, without regarding any error or other imperfection in the original summons and the service

thereof, or on the trial, judgment, or other proceeding of the justice or marshal in relation to the cause.'

Moreover, section 69-6-8 provides:

'When appeal deemed perfected: Amendment of pleadings. That from the filing of the transcript with the clerk of the district court the appeal is perfected, and the action is to be deemed pending therein and for trial upon the issue tried in the justice's court. The appellate court has the same authority to allow an amendment of the pleadings on an appeal in a criminal action that it has on an appeal in a civil action.'

Among the notes of decisions following this latter section are these:

'On appeal to the district court, the case is to be tried *de novo* as if originally initiated in such court. *United States v. Meyers* (1903) 2 A. 158; *United States v. Sharp* (1921) 6 A. 408.

Upon appeal, trial *de novo* in the district court is given as a matter of absolute right. *Jorge, Application of* (1945) 10 A. 633, 639.'

Thus, cases both civil and criminal which are appealed to the District Court are tried *de novo*. Such a trial in the appellate court is one had as if no action whatever had been instituted in the court below. On such a trial the judgment of the lower court is not reviewed and reversed or affirmed. The perfection of the appeal vacates the lower court's judgment and a new, distinct, and independent judgment—as may be required by

the merits shown on the new trial—is rendered by the appellate court. *Lott v. Illinois Central R. Co.*, 10 So.2d 96; *State v. Kool*, 140 P.2d 737; and *Hall v. McKee*, 179 S.W.2d 590. Accordingly, when the clerk of the District Court collects the fine in an appeal from the magistrate's court, he is not collecting the fine imposed by the court below but the fine imposed by the new and distinct judgment of the District Court rendered after consideration of the merits of the trial *de novo*; and this is so whether the fine is in the same or a different amount from that originally imposed by the magistrate's court. Thus, the fine is a District Court fine and is required to be disposed of as provided by 48 U.S.C. 106 by deposit to 'Fund C' and we construe the requirement of the Alaskan legislature that 'all fines * * * shall belong to the municipality and be paid over to its Treasury' as not affecting fines collected by the clerks of the District Court of Alaska even though the municipal court, had an appeal not been taken to its judgment, would have been bound thereby."

Counsel for the appellant argue that the District Court held that it was without jurisdiction to entertain the instant case. Such is obviously incorrect. The case was submitted to the Court on an agreed statement of facts and on briefs of the respective parties. Its decision was in effect that the appellant had no cause of action against the Clerk of the District Court under the laws applicable to the facts, and, therefore, dismissed it. In this respect, the holding of the Circuit Court of Appeals, Ninth Circuit, in *Hill v. Valen-*

tine, 164 Fed. 328, cited and quoted in the decision of the District Court filed October 4, 1957, is unquestionably applicable and controlling here. There is no question whatever that the defendant in the instant case was and is now the duly appointed Clerk of the District Court for the District of Alaska, Third Division, and that the money (fine imposed and collected lawfully in the *Austin* case) passed into the registry of the Court and became money belonging to the United States of America and subject to disposition only under the provisions of sections 106 and 107 of Title 48 U.S.C. It is therefore apparent that the clerk could not consent to be sued as such, or otherwise, in relation to said money.

CONCLUSION.

It seems that the appellant overlooks the fact that Alaska is still a Territory under the exclusive control of Congress except as to the powers delegated to the Territory by Congress. There is no act of Congress dealing with the collection and disposition of money (fines) by the Clerk of the District Court for the District of Alaska other than those parts of the Act of June 6, 1900, found in sections 106 and 107 of Title 48 U.S.C., and having been lawfully collected the Clerk must cover them into the treasury of the United States unless applied by order of the Court to the incidental expenses of the Court.

In the light of the foregoing appellee prays that this appeal be dismissed or that one or the other of the judgments made and entered in the case be affirmed with costs to the appellee.

Dated, Anchorage, Alaska,
May 1, 1958.

Respectfully submitted,

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(Appendix Follows.)

Appendix.



Appendix

STATUTES CITED IN BRIEF.

106, Title 48, USC, as amended. Appellant's Appendix, Page No. ii. As Sec. 54-4-5 ACLA 1949.

107, Title 48, USC, as amended:

“CLERK’S FEES, ACCOUNTS, AND CLERICAL HELP. Each Clerk shall collect all money arising from the fees of his office or on any other account authorized by law to be paid to or collected by him, and shall report the same and the disposition thereof in detail, under oath, quarterly, or more frequently if required, to the Court, the Director of the Administrative Office of the United States Courts, and the Secretary of the Treasury, and all public money received by him and his deputies for fees or on any other account shall be paid out by the clerk on the order of the court, duly made and signed by the judge, and any balance remaining in his hands after all payments ordered by the court shall have been made shall be by him covered into the Treasury of the United States at such times and under such rules and regulations as the Secretary of the Treasury may prescribe. The clerk may employ, with the approval of the court, necessary clerical assistants and other employees in such number as may be approved by the Director of the Administrative Office of the United States Courts. June 6, 1900 c. 786, Sec. 10, 31 Stat. 325; June 25, 1948, c. 646, Secs. 13, 39, 62 Stat. 987, 996.”

16-1-70, ACLA 1949. Appellant's Appendix, Page No. i.

69-6-1, ACLA 1949:

“RIGHT TO APPEAL. That an appeal may be taken from a judgment of conviction given in a justice's court, in a criminal action, to the district court, except when the same is given on a plea of guilty, as prescribed in this chapter, and not otherwise. (CLA 1913, Sec. 2550; CLA 1933, Sec. 5841.)”

69-6-4, ACLA 1949:

“TRANSCRIPT. That when an appeal is allowed, the Justice must make the proper transcript and deliver it to the Clerk of the District Court within ten days after the appeal is allowed, or deposit the same in the United States postoffice addressed to the Clerk of the District Court within such time. (CLA 1913, Sec. 2554; am L 1929, ch 60, Sec. 1, p. 129; CLA 1933, Sec. 5844.)

69-6-8, ACLA 1949. Appellant's Appendix, Page No. ix.

69-6-9, ACLA 1949. Appellant's Appendix, Page No. ix.

No. 15865

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM CECIL POOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the
District of Nevada.

BRIEF OF APPELLANT.

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District of Nevada.

BRIEF OF APPELLANT.

Statement of Jurisdiction.

The appellant, William Cecil Pool, was indicted in two counts under 18 U. S. C. 242 [R. 3-6]. Appellant entered a plea of not guilty [R. 304]. Appellant was found guilty by the jury verdict rendered on October 17, 1957 [R. 307]. Appellant filed a motion for a new trial [R. 308-309] which the trial court denied [R. 310]. Judgment, sentence and commitment were entered by the trial court on November 1, 1957 [R. 309-310].

Appeal from this final judgment to this Court is pursuant to 28 U. S. C. 1291 and 18 U. S. C. 3772. Appellant filed notice of appeal on November 18, 1957 [R. 35-36] pursuant to Federal Rules of Criminal Procedure, Rule 39, and the rules of this court.

Statement of the Case.

The appellant, during the period he was chief of police of the City of North Las Vegas, Nevada, was the target of political dissention in Clark County, Nevada, which resulted in the filing of a recall petition and the investigation by the Clark County grand jury of the police department of North Las Vegas [R. 269]. Among the matter investigated by the grand jury was the alleged beating of two prisoners held in the custody of the North Las Vegas police department in February 1956 [R. 258]. No indictment was returned by the Clark County grand jury [R. 271].

Seven months later the appellant was charged with a violation of Section 242 of Title 18, United States Code, as a result of the alleged beating of prisoner Coite M. Gaither, Jr., during the morning of February 27, 1956, and the alleged beating of prisoner Ray L. Sage, Jr., during that afternoon while each of them was in the custody of the North Las Vegas police department [R. 3-6, 41].

A. The Original Facts Presented to the Clark County Grand Jury.

On the morning of February 27, 1956 two burglary suspects were arrested and brought to the North Las Vegas police department [R. 130-131]. Within forty-eight (48) hours both suspects signed written confessions to the crime of burglary [R. 230]. Both stated in the trial below that they were guilty of the felony for which they had been convicted [R. 108, 147-148]. The disposition of each case was one to fifteen years in the Nevada State Prison [R. 50, 91, 148]. Their sentences were commuted after serving ten months [R. 110, 148].

One suspect, Coite M. Gaither, Jr., asserted his innocence throughout the police investigation, until an accomplice of Gaither gave the police a sack with the stolen money in it and signed a statement implicating Gaither in the crime [R. 228, 142]. Only then did Gaither admit that he had stolen slot machines from three different markets in North Las Vegas [R. 143, 228], although he refused to admit to other burglaries about which he was then questioned [R. 143].

The other suspect, Ray L. Sage, Jr., also denied the crime until he was presented with a statement signed by an accomplice [R. 73]. Then he also admitted the same three burglaries [R. 87].

Both Sage and Gaither were booked in the Clark County jail on February 29, 1956, at the time they pleaded guilty [R. 223]. On March 1, 1956, a report was received by the Sheriff's department of Clark County that two men in the County jail was injured [R. 221]. The Sheriff's representative took pictures of Sage, although no pictures were taken of Gaither and no physician was called [R. 222-223].

Thereafter, the Clark County grand jury investigated the case as part of its consideration of the petition to recall the North Las Vegas police [R. 269, 271].

It appears that one witness before the grand jury was Victor L. Carlson, then a member of the North Las Vegas police department [R. 164]. Carlson, several days before he knew of the grand jury investigation, had signed a statement dated February 27, 1956 which said that earlier that day he and a fellow officer, Captain Clifton, were driving prisoner Sage to the Henderson, Nevada, city jail, that Sage had attempted to jump out of

the speeding car and had thus been injured [Deft. Ex. C, R. 198].¹ On March 3, 1956 he signed a similar statement [Deft. Ex. D, R. 199].² Ultimately, Carlson testified to the same facts before the Clark County grand jury [R. 197].

B. The Reversal of Testimony by Witness Victor L. Carlson.

On April 25, 1956 Victor L. Carlson was discharged from the North Las Vegas police department [R. 199].³ The appellant was still the chief of police.

Carlson appeared as a prosecution witness in the trial below and testified as an accomplice of the appellant in the alleged beatings of the two prisoners. He repudiated (1) his written statement of February 27, 1956, (2) his statement of March 3, 1956, and (3) his testimony before the Clark County grand jury..

He first offered to explain that his February 27, 1956 statement was made on direction of the appellant "to get the heat off of us from the County grand jury" [R. 198]. He then admitted that his statement preceded by one or two days his learning that there was going to be heat from the County grand jury [R. 198]. He then offered another explanation, namely, that the statement was "a

¹The North Las Vegas police station had no jail, and as a result prisoners were confined in the city jail of nearby Henderson or Las Vegas [R. 182].

²Defendant's Exhibits C and D were statements introduced to impeach prosecution witness Carlson.

Assuming *arguendo* that prisoner Sage was truly beaten on his trip to Henderson, the Carlson statement at least showed that Carlson and Clifton, *and not the appellant*, were present on the trip.

³The record does not disclose the extent to which his discharge led Carlson to make a complete reversal in his sworn testimony.

cover-up . . . in case anything came up” as a result of a statement to Dr. French at the city jail in Henderson [R. 198].

His grand jury testimony allegedly stemmed from threats made to him by the appellant [R. 190, 197].⁴ He said that he and Clifton drove to the spot where prisoner Sage had been beaten and burned certain evidence [R. 192-193]. He added that in a police car trip to Baker, California, the appellant ordered Captain Clifton to stay out of Las Vegas and he discussed his grand jury testimony [R. 189-190].

C. The Testimony of the Witnesses Other Than the Alleged Accomplice Carlson and the Two Convicted Felons.

Dr. J. B. French, the physician who examined the wounds of prisoner Sage when he was in the Henderson, Nevada, jail on the night of February 27, 1956, replied to a prosecution request for an opinion as to the nature of the wounds and its cause [R. 80]:

“No, I do not believe I could answer that question honestly.”

Billy Richards Leeds, a former officer of the North Las Vegas police department, said that on February 27, 1956 he saw prisoner Sage at the police station from 9:00 A. M. until 3:00 P. M. and observed no physical

⁴The reason is not clear from the record why, if Carlson's cooperation was essential to protect the appellant, Carlson was discharged from the police force on April 25, 1956, six months before the termination of the appellant as chief of police.

The record fails to show the presence of the appellant at the time of the delivery of Sage to the Henderson jail, the picking up of Sage at the Henderson jail, or the alleged destruction of the evidence [R. 192].

mistreatment [R. 237]. At 3:00 P. M. he did see prisoner Sage leave the station, but it was with Captain Clifton and Officer Carlson [R. 239].⁵

Al Ferguson, the former police commissioner of the City of North Las Vegas, testified that during the evening of February 28, 1956 he saw Ray L. Sage, Jr. at a desk in the police station writing a statement, that no one dictated the statement, that Sage sat at a desk alone and that when Sage finished, the appellant asked Sage to open his shirt and show certain body bruises to the police commissioner [R. 225-227].

Witness Ferguson added that in the evening he and two other officers escorted Coite M. Gaither, Jr. from his place of confinement in the Las Vegas city jail to the police station in North Las Vegas, that an officer showed Gaither incriminating evidence and that Gaither then admitted the burglaries [R. 228]. He said that Gaither wrote his own statement and that no one dictated it [R. 229-230]. Later they went to dinner and Gaither refused to eat, because Gaither said his stomach was upset because of too much drinking [R. 231].

Coite M. Gaither, Jr., one of the prisoners allegedly beaten, admitted that during the afternoon after the alleged beating he was confined for about six hours in the Las Vegas jail, he had complained to no one except to ask for pills to relieve his stomach ulcers, and he and Sage had been on a "three or four day drinking bat" [R. 141, 154]. Gaither never complained to Police Commissioner Ferguson of the alleged beating although he

⁵Significantly, the appellant was not seen leaving with Sage when Sage was driven to the Henderson, Nevada jail, during which trip the beating allegedly occurred.

had the opportunity when Ferguson saw him that night [R. 231-232].⁶

Ray L. Sage, Jr., the other prisoner allegedly beaten during the trip, was left at the Henderson, Nevada, jail on February 27, 1956 in the afternoon [R. 70]. He was confined in the Henderson jail three hours before he asked a jailor to bring a physician and showed his bruises [R. 71]. Later that night at about 10:00 P. M. Dr. French examined him, and heard Sage assert he had been beaten by members of the North Las Vegas police department [R. 71, 77-78; Deft. Ex. A].⁷

The next night Sage wrote a statement at the North Las Vegas police department in his own words, which he admitted was not dictated to him [R. 101-102]. In the statement Sage exonerated the appellant [R. 102, Deft. Ex. B]. Sage testified he made his statement because the North Las Vegas police had promised they would use him as a State witness and not prosecute him for burglary [R. 91-92, 107-108].⁸ However, he pleaded guilty, was sentenced to the Nevada State Prison, and

⁶The first complaint by Gaither appears to have been after he had been sentenced to Nevada State Prison and was in the county jail.

⁷In Sage's statement to Dr. French, he said he did not know who the policemen were who allegedly beat him and at one point he said there were just two officers [Deft. Ex. A].

It may be argued that the story of the beating was fabricated by Sage to stay out of the custody of the North Las Vegas police at a time when he was still denying his guilt.

However, statements were clearly made that showed the presence of Carlson and Clifton, *but not the appellant*, on the trip to the Henderson jail.

⁸This was the statement which Police Commissioner Al Ferguson saw Sage write alone at the time Sage was asked by the appellant to open his shirt and show the bruises on his body to the commissioner.

not until he was in the Clark County jail did his body bruises come to the attention of the Sheriff [R. 109].

Ramona Wolf, a prosecution witness, on February 27, 1956 was typist and secretary to the appellant. On that day she was also the wife of the appellant, although they were divorced in April 1956 [R. 208-209]. She testified that she first saw the appellant interrogating Gaither; that the appellant then called her to his desk and dictated a statement; that after she transcribed the statement Gaither signed it, that thereafter she heard the appellant command Gaither to take a ride and they left; that after an hour the appellant and Gaither returned and Gaither's face appeared flushed and red [R. 211-213].⁹ She also testified that some time during the same day, she saw Sage go to a police car outside the station with the appellant, Captain Clifton and Officer Carlson [R. 214].

D. The Principal Evidence Presented by the Prosecution.

According to witnesses Gaither and Carlson, during the morning of February 27, 1956, the appellant and Carlson took Gaither by car to a dirt mound, the appellant struck Gaither in the face several times, the appellant told Carlson to strike Gaither, and Gaither fell down three times; but he denied committing the crime [R. 167-171, 160-162]. After thirty (30) minutes (according to Carlson) or an hour and a half (according to Gaither) they returned to the police station in North

⁹It appears that witness Ramona Wolf was completely unreliable as a prosecution witness, because even Gaither and Carlson said that the appellant took Gaither for the ride the morning of February 27, 1956, that Gaither was in the Las Vegas jail for six hours until that evening when he signed a confession upon reading the incriminating evidence [R. 135-143]. Whether her testimony was motivated by her divorce from the appellant is speculative.

Las Vegas [R. 170-171, 162-163]. Thereafter, Gaither was taken to the Las Vegas city jail where he was confined. Six hours later that evening Gaither was returned to the North Las Vegas police station, presented with incriminating evidence, and he confessed to the burglaries [R. 167-168].

During that afternoon, according to witnesses Sage and Carlson, Sage was placed in a car by the appellant and Captain Clifton and Carlson and driven to an isolated spot [R. 172-174]. According to Carlson, the appellant told Sage to get out of the car, ordered Captain Clifton to work him over, Clifton beat Sage with a flashlight and the appellant kicked Sage [R. 172-173, 62-65]. Later Sage was confined in the Henderson, Nevada, jail [R. 69-70]. Sage signed a confession to the burglary the next day when he was presented with an incriminating confession of an accomplice [R. 87-88].

E. The Questions Involved and the Manner in Which They Are Raised.

The questions raised on this appeal fall into three general categories: (1) Errors in rulings on the admission and exclusion of evidence; (2) Errors in instructing the jury; (3) Whether the trial court allowed a prejudicial variance between the proof and the indictment; (4) Whether the trial court in its charge to the jury amended the indictment.

1. Rulings which had the effect of admitting incompetent and prejudicial evidence were as follows:

(a) The District Attorney of Clark County appearing as a witness was allowed to make a voluntary, gratuitous statement not in response to the question propounded, which prejudiced the appellant with the jury

[R. 271]. The trial court refused to grant the immediate motion by the appellant that the statement be stricken as improper opinion and prejudicial [R. 271-272]. The appellant cited the error in his motion for new trial [R. 288-290]; but the trial court denied the motion.

(b) The testimony of the appellant's wife (at the time, though later divorced) as to the manner in which appellant talked to a prisoner in her presence was admitted, although the prisoner was alleged to have been beaten by the appellant in the indictment. Appellant's objection on the ground that such communications were confidential and privileged was overruled by the trial court [R. 209-210]. The appellant cited the error in his motion for new trial [R. 297]; but the trial court denied the motion.

2. A ruling which had the effect of excluding admissible evidence was as follows:

Upon the appellant's cross-examination of a critical prosecution witness, Appellant offered a prior inconsistent statement for the purpose of impeachment [R. 200]. The trial court rejected the offer [R. 203]. At the conclusion of the trial, the trial court reversed its ruling and admitted the exhibit [R. 275]. In appellant's motion for a new trial, the prejudicial effect of delaying the appellant in introducing this exhibit was cited [R. 291-292]; but the trial court denied the motion for a new trial.

3. Appellant failed to except to the court's charge to the jury. However, appellant now contends that the trial court's charge failed to explain and define the offense with which the appellant was charged and that the error was sufficiently serious for the appellate court to notice the erroneous instructions under Rule 52(b), Federal Rules of Criminal Procedure.

4. The trial court permitted a material variance between the proof and the indictment which prejudiced substantial rights of the appellant. Appellant filed a motion for acquittal at the end of the Government's case [R. 224]. Appellant's trial counsel did not repeat the motion for acquittal at the end of the trial. However, the error was cited in appellant's motion for new trial [R. 282-288]; which was denied.

5. The trial court amended the indictment in its charge to the jury. Appellant cited the error in the motion for new trial [R. 282-288, 292-295]; which was denied.

Specification of Errors.

1. The Court erred in refusing to grant the motion of appellant Pool to strike certain evidence and in refusing to instruct the jury to ignore such evidence, which motion was timely during the testimony of witness George Dickerson, District Attorney of Clark County, Nevada, who testified as follows:

“Q. Mr. Dickerson, I believe you testified this morning that you had participated in part in the matter of presentation of this matter to the Clark County grand jury. What did you mean when you said in part? A. I was not present during any time when the evidence was submitted. I was present outside after the conclusion of the matter. Questions as to the legal problems involved, as to what crimes, if any, could be determined by the grand jury were asked of me, at which time I informed the grand jury that it was without jurisdiction to entertain any action in this regard, in that the evidence adduced constituted at the most a misdemeanor offense; that the grand jury is an arm of the dis-

strict court and can return an indictment only on matters tried with the district court.

Mr. Watson: I think Mr. Dickerson's legal opinion in the matter of the State law of Nevada in the matter of the grand jury is not proper at all, as being prejudicial and should be stricken.

The Court: Let me make this very obvious observation. Counsel are not permitted to sit idly by and allow inadmissible matter to go into the record and thereafter gamble on the chance of it being favorable or unfavorable and moving to strike. They are required to make objections to questions asked. Now this Court was aware of it as soon as that question was asked, but you didn't see fit to make the objection.

Objection overruled" [R. 271-272].

2. The Court erred in instructing the jury in that the instructions as a whole failed to state that the charges against appellant Pool was the obtaining from a prisoner a confession, statement or information by force and violence with the specific intent to deprive the prisoner of that specified Federal constitutional right and therefore the Court omitted an essential ingredient of the offense charged [R. 6-21].

3. The Court erred in instructing the jury in the following manner:

"If you find from the evidence in this case that the defendants took Sage and Gaither into custody under color of law by reason of the positions they held, then the court charges you that Sage and Gaither had the right to be tried upon any charge for which they have been arrested, in a regularly constituted court of justice having jurisdiction and if found guilty subjected to the usual pain and penal-

ties applicable to all persons alike for the offense charged, but not to be subjected to unusual punishment or to be tried by ordeal by the defendants. Those were their constitutional rights and privileges under the Federal Constitution" [R. 13].

4. The Court erred in instructing the jury in the following manner:

"But, as I said before, if Sage and Gaither were taken into custody by the defendant, under color of law, by reason of the positions held by the defendants, then the ordeal to which the defendant, Pool, subjected both Sage and Gaither and the ordeal to which the defendant, Clifton, subjected Sage at a point near Nellis Air Force Base constituted a violation of the Federal statute" [R. 14].

5. The Court erred in instructing the jury in the following manner:

"In order to convict defendants Pool and Clifton under Count I it is necessary for the jury to find that the defendants had in mind the specific purpose of depriving Sage of a Constitutional right—that is to deprive him of the right to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed; and in order to convict Pool under Count II it is necessary for the jury to find that the defendant had in mind the specific purpose of depriving him of the right to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed" [R. 16].

6. The Court erred in instructing the jury in the following manner:

“If you find the acts alleged in the indictment to have been committed, then let me summarize the questions you have to determine:

As to Count I,

(1) Did defendants Pool and Clifton take Sage into custody under color of law?

(2) Did defendants Pool and Clifton specifically intend to deprive Sage of a constitutional right guaranteed to him by the United States Constitution?

(3) Has the government established these two foregoing essentials to your satisfaction beyond a reasonable doubt?

If the government has done so it is your duty to find the defendants guilty in this case. If you have a reasonable doubt upon either of the two essentials, it is your duty to acquit the defendants.

As to Count II,

(1) Did defendant Pool take Gaither into custody under color of law, and

(2) Did defendant Pool specifically intend to deprive Gaither of the constitutional right guaranteed to him by the United States Constitution?

(3) Has the Government established these two foregoing essentials to your satisfaction beyond a reasonable doubt?

If the Government has done so it is your duty to find the defendant guilty in this case. If you have a reasonable doubt upon either of these two essentials, it is your duty to acquit the defendants” [R. 18-19].

7. The Court erred in refusing to grant the appellant Pool’s motion for a new trial which motion was based

upon a material variance between the evidence and the indictment, in that, assuming *arguendo* the evidence is construed favorably to the plaintiff it shows that (a) in the case of prisoner Gaither after his alleged beating he denied any knowledge of a crime, thereafter for about five and one-half hours he admitted nothing while in jail, thereafter he was shown a sack full of change and pieces of paper which he read, then he offered to confess to certain burglaries and not to any other burglaries, and (b) in the case of prisoner Sage after his alleged beating he admitted nothing, thereafter he was in jail overnight and admitted nothing, and on the next day after he was shown the confession of prisoner Gaither he offered to confess to the same burglaries as Gaither did, and the indictment included as one of the elements of the offense that appellant Pool had deprived each of the prisoners of a Federal constitutional right by obtaining a confession, statement or information by force and violence with the specific intent to deprive each of the said prisoners of the specified constitutional right, and that the said variance was prejudicial to substantial rights of appellant Pool [R. 282-288].

8. The Court erred in excluding from evidence during the cross-examination of witness Victor L. Carlson appellant Pool's Exhibit C, which was offered by appellant Pool during the cross-examination of witness Victor L. Carlson for the purpose of impeachment, said Exhibit C comprising an inconsistent statement identified as having been signed by witness Victor L. Carlson [R. 200, 203, 275].

9. The Court erred in admitting into evidence over the objection of appellant Pool to testimony of witness Ramona Wolf and in overruling said objection, since the testimony related to the interrogation of prisoner Gaither by appellant Pool in front of witness Ramona Wolf, and the objection made was that witness Ramona Wolf was the wife of appellant Pool at the time of the said occurrence, that the communications were made to her in confidence as the wife of appellant Pool, and that such confidential communications could not be disclosed over the objection of appellant Pool [R. 209-210].

10. The Court erred in refusing to grant the appellant Pool's motion for a new trial which motion was based upon the failure of the evidence to support the verdict, in that, *arguendo*, assuming the evidence is construed favorably to the plaintiff it shows that (a) in the case of prisoner Gaither after his alleged beating he denied any knowledge of a crime, thereafter for about five and one-half hours he admitted nothing while in jail, thereafter he was shown a sack full of change and pieces of paper which he read, then he offered to confess to certain burglaries and not to any other burglaries, and (b) in the case of prisoner Sage after his alleged beating he admitted nothing, thereafter he was in jail overnight and admitted nothing, and on the next day after he was shown the confession of prisoner Gaither he offered to confess to the same burglaries as Gaither did, and the indictment required the plaintiff to prove beyond a reasonable doubt that the deprivation of a Federal consti-

tutional right which appellant Pool committed was obtaining from each prisoner a confession, statement or information by force and violence with the specific intent to deprive each of the said prisoners of the specified Federal constitutional right [R. 282-288, 292-295].

11. The trial court erred in denying appellant's motion for a new trial [R. 280-299].

Summary of the Argument.

"From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing into presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (*Bollenbach v. United States*, 326 U. S. 607 (Frankfurter, J.).)

1. The District Attorney of Clark County, testifying as a witness to produce a document and to lay a foundation for its introduction, added a voluntary and gratuitous statement which was not admissible as evidence, was not responsive to the question propounded, and prejudiced the appellant. The appellant's motion to strike the statement as improper and prejudicial opinion was overruled. The

failure of the trial court to sustain the objection and instruct the jury to disregard the statement of the witness constitutes reversible error.

2. The trial court failed in the jury instructions to explain and define the offense with which the appellant was charged. The evidence construed favorably to the prosecution showed only that prisoners were beaten, not that confessions were procured by force and violence. The indictment specified among the Constitutional deprivations suffered by the prisoners the procurement of confessions by force and violence. The jury charge as a whole was confusing and inadequate as to which Constitutional right the jury must find the prisoners were deprived of with the requisite specific intent. The error was sufficiently serious to allow the appellate court to reverse despite appellant's failure to take exception to the charge.

3. The evidence construed favorably to the prosecution materially varied from the indictment. The evidence did not show that confessions were procured by force and violence. Nevertheless, this was alleged in the indictment. The appellant was led to believe that the charge could be refuted by a witness to the signing of the confessions to show that the acts were voluntary. The prosecution relied on a beating to prove its case, despite the absence of a causal relation between the beating and the signing of the confessions. Therefore, appellant did not have sufficient time to seek an alibi witness to show where he was at the time of the beating.

4. During the cross-examination of a critical prosecution witness, the appellant endeavored to impeach him by introducing a prior inconsistent statement. The trial court excluded the statement. At the end of the trial the statement was admitted. The delay imposed on the appellant in impeaching the prosecution witness was an abuse of the trial court's discretion and constitutes reversible error.

5. The trial court overruled the appellant's objection and allowed appellant's wife (since then divorced) to testify to the manner in which the appellant talked to a prisoner in her presence; which appellant contends was a confidential communication and privileged. The denial of appellant's objection was reversible error.

6. The prosecution's own evidence failed to show that confessions were procured by appellant by force and violence. The indictment included this element as one of the material Constitutional deprivations to which the appellant subjected his prisoners. The trial court ignored this element of the indictment and omitted it from the charge to the jury. The trial court amended the indictment.

ARGUMENT.

I.

The Trial Court Committed Reversible Error in Refusing to Strike the Prejudicial Testimony by the Clark County District Attorney Regarding the Evidence Before the Grand Jury.

A. The Testimony of the Clark County District Attorney and the Circumstances Under Which It Was Given.

The appellant endeavored to impeach one prosecution witness, Ray L. Sage, Jr., by introducing into evidence a copy of a prior inconsistent statement which had been signed by Sage [R. 99]. The Court withheld ruling on the offer of the statement to give the appellant's counsel an opportunity to make a further attempt to produce the original record [R. 100-101]. The District Attorney of Clark County was subpoenaed by the appellant to produce the original statement [R. 258-259]. The document was produced and admitted into evidence [R. 270]. In laying the foundation for the requirement that he produce the document, the appellant's counsel asked the District Attorney whether he had occasion to advise the grand jury regarding an investigation of the North Las Vegas police department in the spring of 1956 with reference to the alleged beating of two prisoners held in custody of the North Las Vegas police department in February and March of 1956 [R. 257-258]. He answered: "In part, yes" [R. 258].

On cross-examination, the prosecutor asked the District Attorney to explain the testimony that he "had participated in part in the matter of presentation of this matter to the Clark County grand jury" [R. 271]. He answered that he was not present during any time when

the evidence was submitted, but that he did advise the grand jury as to which crimes were under its jurisdiction [R. 271]. He then added, gratuitously [R. 271]:

“I informed the grand jury that it was without jurisdiction to entertain any action in this regard, and that the evidence constituted at the most a misdemeanor offense.”

This was practically the last testimony heard by the jury before the close of the trial [R. 275].

B. The Prejudicial Effect of the Testimony of the Clark County District Attorney.

The evidence of guilt in this case was not clear. The principal witnesses on behalf of the prosecution were two convicted felons and an admitted perjurer who had testified under oath to the complete opposite eighteen months before and had to repudiate two signed statements in order to testify for the prosecution in this case.

The District Attorney who made the statement was a person of standing and experience in the community, and his remarks naturally carried weight with the jury.

The evidence was highly prejudicial to the appellant for two reasons:

(1) The jury might have inferred from the testimony that the failure of the Clark County grand jury of 1956 to return an indictment stemmed from its reliance on the advice of the District Attorney, rather than a refusal to conclude that a crime had been committed. Either conclusion would have been speculative, but it was certainly prejudicial to intimate that one reason was a stronger motivation than another.

(2) The jury might have inferred that the District Attorney had evaluated the evidence presented to the Clark County grand jury of 1956 as sufficient to show the commission of a crime (a misdemeanor), under the penal laws of Nevada.

The statement of the District Attorney was an expression of opinion which was not admissible as evidence. It was not responsive to the question propounded, which merely sought an explanation of the extent to which he "participated in part" in the presentation to the grand jury. The District Attorney was experienced in a court procedure. The statement was made in response to questioning by a fellow prosecutor. The inescapable conclusion is that the statement of the District Attorney was designed and calculated to influence the jury to the prejudice of the appellant, and should therefore justify a reversal of the conviction.

C. The Refusal of the Trial Court to Strike the Statement of the District Attorney.

As soon as the District Attorney made the statement, the appellant's counsel asked that it be stricken as improper opinion and prejudicial [R. 271]. The trial court refused to sustain the objection on the ground that the inadmissibility of the evidence was revealed by the question itself [R. 271-272]. The failure of the trial court to remove the damaging statement from the consideration of the jury was clearly reversible error.

In *Nalls v. United States* (5th Cir., 1957), 240 F. 2d 707, the defendant was convicted for knowingly and willfully acquiring marihuana without having paid the transfer tax imposed by law. On appeal from his conviction, a new trial was granted although the trial court

had stricken a voluntary statement of a police officer, because of the prejudice which must of necessity stem from such testimony. The Court stated on page 710 of 240 F. 2d:

“An unresponsive statement was volunteered by City Policeman Scott for which the Government was not responsible. When asked what he did when he first saw defendant, the officer replied: ‘Our Department carried a pick-up on him on a warrant held by the sheriff’s office.’ The Court, upon objection and request stated: ‘I believe at this stage of the proceeding I will sustain the objection and instruct the jury not to consider that remark.’ A mistrial was promptly asked and refused. *We think that this statement was calculated to influence the thinking of the jury and was likely to induce prejudice. . . .*” (Emphasis supplied.)

In *Lott v. United States* (5th Cir., 1955), 218 F. 2d 675, 680, a new trial was granted to the accused because of error which resulted from a volunteered statement by a police officer that “we knew one of these defendants was pushing dope” out of his apartment in a prosecution for a conspiracy to violate the narcotics laws.

In *Helton v. United States* (5th Cir., 1955), 221 F. 2d 338, 340, it was held that reversible error resulted from a volunteered statement of an officer in a prosecution for the illegal acquisition and production of marihuana that the defendant had told the officer “that he had been smoking marihuana intermittently very seldom for past four or five years.”

In *State v. Cooper* (S. Ct. of La., 1953), 66 So. 2d 336, a manslaughter prosecution arising out of a shooting, the defendant pleaded self-defense and contended that

deceased had procured a weapon from his automobile and was advancing on defendant to carry out a threat to kill. The appeal arose from a certain unsolicited opinion given by the coroner, while he was testifying for the State at the inception of the trial. After stating that he had visited the scene of the crime on the day of the shooting, the coroner was asked:

“Q. Will you please tell the jury what you know about that? A. I was called to the house and found a man lying on the ground with—he had fallen out of the door of his car, on the driver’s side of the car.”

Defense counsel objected to the statement as an expression of the witness’ own deduction, drawn from the position in which he had seen the body; and the trial court overruled the objection.

The appellate court in *State v. Cooper, supra*, 66 So. 2d at 337-338, stated:

“Of course, the doctor was an expert and it was permissible for him to express an opinion on medical matters concerning which he had special knowledge by reason of his training and experience. But, in voicing his impression or opinion that a man had fallen out of the door of his automobile, when he had not been a witness to the occurrence, he was not giving expert testimony. Manifestly, he was no better qualified to draw such a conclusion than any lay witness.

“That this evidence was highly prejudicial to appellant is also not a matter of doubt. He had pleaded self-defense and was contending that the deceased

had procured a weapon from the car and was advancing upon him to carry out a threat to kill, made only a few seconds prior to the firing of the fatal shot. The State, on the other hand, was maintaining that the deceased had been shot while sitting in his car. Thus, the inadmissible unsolicited opinion of the Coroner was in direct support of the theory of the prosecution.

“In his *per curiam* to this bill of exceptions, the judge states:

‘The court immediately upon overruling objection of Counsel instructed the witness to testify as to only what he saw and specifically instructed the “jury” immediately as to the law.’

“The action taken by the judge did not repair the damage. The overruling of the objection can only be regarded as an approval of the witness’ statement to the jury. This error was not cured by the instruction to the witness to testify only as to things observed by him. Indeed, this instruction may have created in the minds of the jury an impression not intended by the judge—that is, that the witness should testify only to things he had seen and that everything that he had previously said was perfectly appropriate and should be considered because counsel’s objection was not well taken.

“Nor do we think that the instruction which the judge gave the jury, immediately after counsel had reserved this bill of exceptions, remedied his error in permitting the statement of the witness to stand. That instruction was merely that the jury should take the case and try it solely on the evidence it heard and that it was to disregard any statement by either the court or counsel ‘which is contrary to

the evidence which you hear from the witness chair.' This does not inform the jury that it should not consider the objectionable opinion of the Coroner, rather, it suggests that the jurymen should scrutinize all the evidence heard from the witness chair and were to disregard the contrary statements of the court and counsel.

"The proper procedure for the judge was to have sustained the objection and instructed the jury to disregard the statement of the witness. *State v. Martin*, 193 La. 1036, 192 So. 694. Since we find that the reception of this illegal evidence was prejudicial to the substantial rights of appellant, he is entitled to a new trial."

Annotation, 8 A. L. R. 2d 1013 ff., contains a comprehensive review of the cases on the "Effect of voluntary statements damaging to accused, not proper subject of testimony, uttered by testifying police or peace officer." The Annotation, on pages 1015-1016 of 8 A. L. R. 2d, sets forth the factors which have led appellate courts to hold that the error involved in such improper voluntary statements was, under the circumstances, either alone or in conjunction with other errors, prejudicial and reversible:

"(1) the erroneous statement, alone or considered along with other errors occurring in the trial, led to the conclusion that accused did not have the fair and impartial trial guaranteed by law (and such result has obtained even in a case where the reviewing court stated that there was clear evidence of guilt); (2) the erroneous statement probably did cause, or might have caused, the jury to convict; (3) notwithstanding action which may have been

taken by the trial court, if any, to cure the error, the reviewing court concluded, under the circumstances, that the damage to accused could not be eradicated from the minds of the jury; (4) the case was a close one, with the evidence of guilt not entirely clear—especially in cases where the state's case was based on circumstantial evidence; (5) the penalty or sentence assessed by the jury or by the trial court was severe and heavy; (6) the police or peace officer making the statement, such as a sheriff or other well-known officer, was a person of standing, experience, etc., in the community, so his remarks would carry weight with the jury; (7) the officer making the statement was an experienced and trained officer familiar with court procedure; (8) no effort was made, nor action taken, by the trial court to cure the error or to remove the improper and damaging statement from the record or from the consideration of the jury; and (9) the improper voluntary statements were not only made, but were repeated.”

Certainly the factors present in this case meet all the standards recognized for finding prejudicial and reversible error.

II.

The Trial Court Failed in the Jury Instructions to Explain and Define the Offense With Which the Appellant Was Charged.

A. The Court of Appeals Has the Authority to Notice Erroneous Instructions Despite a Failure to Object.

Rule 52(b), Federal Rules of Criminal Procedure, states:

“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

This is an exception to Rule 30, Federal Rules of Criminal Procedure, which provides *inter alia*:

“No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matters to which he objects and the grounds of his objections.”

In *Herzog v. United States* (9th Cir., 1956), 235 F. 2d 664, the United States Court of Appeals held on rehearing, reversing an earlier stand (226 F. 2d 561), that it had the authority to consider error in instructions despite the failure of counsel to object at the trial. The Court held that it had the power under Rule 52(b) to determine whether in a given case to notice the error and disregard Rule 30. The Court further held that it must also determine whether the error “was of so serious a nature as to warrant the disregard of rule 30.” (235 F. 2d at 667.) In the *Herzog* case, *supra*, the Court answered this question in the negative.

Another authority has also favored the liberal view that an appellate court should consider the error if it

affects substantial rights. (Hughes, *Federal Courts: Appellate Court Authority to Notice Erroneous Instructions Despite Failure to Object*, 45 Cal. L. Rev. 382 (1957).)

It is respectfully submitted that the errors cited herein justify consideration by the appellate court despite the failure to object. In *Screws v. United States*, 325 U. S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031, 162 A. L. R. 1330, a conviction under the Federal statute making it an offense to deprive, under color of any law, an inhabitant of a state of any rights, privileges or immunities granted him by the Federal Constitution was reversed by the United States Supreme Court. The defendants, local police officers, had arrested a citizen of Georgia and, in conveying him to the courthouse, had beaten him so severely as to cause his death. The Supreme Court construed the statute as requiring, as an element of the crime, a specific intent that the accused had the purpose to deprive the victim of a constitutional right, such as the right to trial by jury. The trial court had merely charged that defendants acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from an alleged assault by their prisoner. After holding that the charge was insufficient, under the construction given the statute, the Court stated:

“ . . . It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. . . . But there are exceptions to that rule . . . And where the error is fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion.

Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

It is respectfully submitted that in this case, substantial rights were prejudiced by the failure of the trial court to explain and define the offense charged. (*Morris v. United States* (9th Cir., 1946, 156 F. 2d 525, 169 A. L. R. 305.)

**B. The Proof of the Offense Construing the Evidence
Favorably to the Prosecution.**

Construing the evidence in a manner favorable to the prosecution, we find that on the morning of February 27, 1956, the appellant beat prisoner Gaither and that in the afternoon he beat prisoner Sage. Neither beating resulted in a confession. By the testimony of the prisoners themselves, it was clear that the confessions were voluntarily given at a later time when incriminating statements signed by third-party accomplices were shown to the prisoners. Furthermore, the prisoners were not deprived of a fair trial on their day in court, when they subsequently pleaded guilty.

Therefore, the only Constitutional rights of which the prisoners could have been deprived under this state of the evidence were the right to be immune from illegal assault and battery by the appellant, the right not to be assaulted by the appellant and the right and privilege not to be subjected to illegal punishment without due process of law.

C. The Constitutional Deprivations Stated in the Indictment.

The indictment which sets forth the charge against the appellant specifies the following Constitutional rights of which the prisoners were deprived by the appellant:

(1) The right and privilege to be secure in their person while in the custody of the appellant;

(2) The right to be immune from the use of force and violence to obtain a confession, and

(3) The right to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accord with law, and

(4) The right not to be subjected to illegal punishment, force and violence by the appellant [R. 3-6].

D. The Constitutional Deprivations Stated in the Jury Instructions.

In considering the adequacy of the charge to the jury, it should be read as a whole and in its entirety. It is respectfully submitted that the instructions are confusing and inadequate on the question as to which Constitutional right the jury find the prisoners were deprived of with the requisite specific intent.

At one point the trial court stated that the deprivation was "the right to be tried upon any charge for which they had been arrested in a regularly constituted court of justice having jurisdiction and if found guilty subjected to the usual pain and penalties applicable to all persons alike for the offense" [R. 13].

The record, however, clearly shows that the prisoners did not give their confessions by force and violence and that their plea of guilty was voluntarily entered in a court of law.

Then, before discussing the issue of specific intent, the trial court stated:

“If Sage and Gaither were taken into custody by the defendants, under color of law, by reason of the positions held by the defendants, *then the ordeal to which the defendant, Pool, subjected both Sage and Gaither*¹⁰ . . . constituted a violation of the Federal statute” [R. 14; emphasis supplied].

Later in the charge to the jury, the trial court does discuss specific intent, but refers to the Constitutional right “to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed” [R. 6].

Finally, in the trial court’s summary to the jury, only two elements were defined as requisite to a conviction: (1) whether the prisoners were in custody under color of law and (2) whether the appellant had a specific intent to deprive the prisoners of a Constitutional right [R. 18-19].

The summary totally omits the requirement that the prosecution prove beyond a reasonable doubt that the appellant actually deprived the prisoners of any Constitutional right and in addition fails to define that Constitutional right.

Throughout the charge there is confusion as to which Constitutional right the protection must prove the prisoners were deprived of. And at one point the trial court appears to have taken from the consideration of the jury

¹⁰The trial court does not even treat this as a factual issue by inserting “*if you find* that the defendant Pool subjected Sage and Gaither to the ordeal . . .;” but appears to state to the jury that the appellant did subject the prisoners to the ordeal.

the question whether the appellant even mistreated the prisoners [R. 14].

Indeed, the instructions to the jury in this case appear to completely ignore the recognized principle that the offense of violating Section 242 of Title 18, United States Code, consists in *the fact of the* “. . . wilful deprivation under the color of state law of rights secured to prisoners by the Federal Constitution.” (*United States v. Walker* (5th Cir.), 216 F. 2d 683, cert. denied, 348 U. S. 959, 75 S. Ct. 450, 99 L. Ed. 748.)

III.

The Trial Court Committed Reversible Error in Allowing a Variance Between the Proof and the Indictment Which Prejudiced Substantial Rights of the Appellant.

A. The Proof of the Constitutional Deprivations Construing the Evidence Favorably to the Prosecution.

As previously explained in Argument II(B), *supra*, the evidence if construed in favor of the prosecution, *does not show* that confessions were obtained from the prisoners by force and violence (as alleged in the indictment) and *does not show* that the prisoners were deprived of their day in court when they pleaded guilty (as alleged in the indictment).

B. The Variance Between the Proof and the Indictment Prejudices Substantial Rights of Appellant.

Assuming *arguendo* that the proof presented by the Government varied from the allegations of the indictment (which we will demonstrate hereinafter), the variance resulted in substantial prejudice.

Since the prisoners did not sign confessions until they were brought back to the police station in open view of

witnesses and since they wrote their confessions voluntarily, the appellant prepared his defense to the indictment by presenting a reliable witness who was present at the signing of the confessions [Witness Ferguson, R. 224-232]. This should have been sufficient to refute the charge in the indictment that the appellant procured confessions by force and violence, the indictment having specified a causal relation between the beating and the procurement of the confessions (as we will demonstrate hereinafter).

The evidence presented by the prosecution took the defense by surprise. The prisoners admitted that their confessions had been given voluntarily at the police station in North Las Vegas at night, but they testified that they had been beaten earlier in the day at a place miles from the police station, that the beatings did not result in confessions and that they had been confined and not mistreated for a substantial period of time before they returned to the police station and voluntarily signed their confessions. To refute this charge, the appellant should have had an opportunity to seek alibi evidence, such as witnesses who could place the appellant at a time where he could not possibly have committed the crime charged. The appellant had no chance to procure witnesses to explain his whereabouts at the time of the alleged beatings; and he was taken by surprise, because his evidence was directed to the time when the prisoners signed the confessions.

In *Berger v. United States* (1935), 295 U. S. 78, 82, 55 S. Ct. 629, 630, 79 L. Ed. 1314, the Supreme Court stated:

“The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has

been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, *so that he may be enabled to present his defense and not to be taken by surprise by the evidence offered at the trial*; and (2) that he may be protected against another prosecution for the same offense." See *Bennett v. United States*, 227 U. S. 333, 338, 33 S. Ct. 288, 57 L. Ed. 531; *Harrison v. United States* (6 Cir.), 200 Fed. 662, 673; *United States v. Wills* (3 Cir.), 36 F. 2d 855, 856-857. Cf., *Hagner v. United States*, 285 U. S. 427, 431-433, 52 S. Ct. 417, 76 L. Ed. 861. (Emphasis supplied.)

C. The Indictment Led the Appellant to Expect Evidence That Confessions Were Procured by Force and Violence.

In alleging in the indictment the deprivation of "the right and privilege to be immune from force and violence . . . for the purpose of obtaining a confession, statement or information about an alleged offense," the Government employed language which has been clearly interpreted by the Supreme Court of the United States. In *Williams v. United States*, 341 U. S. 97, 103, 71 S. Ct. 576, 95 L. Ed. 774, the indictment charged that the defendants had deprived designated persons of rights and privileges secured to them by the Fourteenth Amendment, to wit:

" . . . the right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune, while

in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said State, and the right and privilege to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Florida . . .”

The defendant in an appeal from his conviction contended that, because the deprivations defined in the indictment included “illegal assault and battery,” the Civil Rights Act had been unconstitutionally applied to convict the defendant for a violation of the state law governing assault.

The United States Supreme Court, however, rejected this contention in the following language:

“But the meaning of these rights in the context of the indictment was plain, viz. *immunity from the use of force and violence to obtain a confession.*”

This conclusion stemmed from the reading of the whole indictment, which supplemented the specified Constitutional rights of which the prisoners had been deprived by the following language:

“. . . that is to say, on or about the 28th day of March, 1947, the defendants arrested and detained the said Frank J. Purnell, Jr., and brought and caused him to be brought to and into a certain building sometimes called a shack on the premises of the Lindsley Lumber Co., at or near 3810 N. W. 17th Avenue, in said City of Miami, Florida, and did there detain the said Frank J. Purnell, Jr., and while he was so detained the defendants did then and there illegally strike, bruise, batter, beat, assault and torture the said Frank J. Purnell, Jr.,

in order illegally to coerce and force the said Frank J. Purnell, Jr., to make an admission and confession of his guilt in connection with the alleged theft of personal property, alleged to be the property of said Lindsley Lumber Co., and in order illegally to coerce and force the said Frank J. Purnell, Jr., to name and accuse other persons as participants in alleged thefts of personal property, alleged to be the property of said Lindsley Lumber Co., and for the purpose of imposing illegal summary punishment upon the said Frank J. Purnell, Jr.”

In short, the Supreme Court held that the charge was not for assault, but for a well recognized and classic deprivation of a Constitutional right. As stated by the Court on pages 101 to 102 of 341 U. S.:

“It is as plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause. This is the classic use of force to make a man testify against himself. The result is as plain as if the rack, the wheel, and the thumb screw—the ancient methods of securing evidence by torture (*Brown v. Mississippi*, 297 US 278, 285, 286, 80 L ed 682, 686, 687, 56 S. Ct 461; *Chambers v. Florida*, 309 US 227, 237, 84 L ed 716, 722, 60 S Ct 472)—were used to compel the confession. Some day the application of §20 to less obvious methods of coercion may be presented and doubts as to the adequacy of the standard of guilt may be presented. There may be a similar doubt when an officer is tried under §20 for beating a man to death. That was a doubt stirred in the *Screws* case; and it was the reason we held that the purpose must be plain, the deprivation of the constitutional right willful. But where police take

matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court. Hence when officers wring confessions from the accused by force and violence, they violate some of the most fundamental, basic, and well established constitutional rights which every citizen enjoys. Petitioner and his associates acted willfully and purposely; their aim was precisely to deny the protection that the Constitution affords. It was an arrogant and brutal deprivation of rights which the Constitution specifically guarantees. Section 20 would be denied the high service for which it was designed if rights so palpably plain were denied its protection. Only casuistry could make vague and nebulous what our constitutional scheme makes so clear and specific."

It is significant to note the evidence which supported the conviction in *Williams v. United States, supra*, as summarized on pages 98 to 99 of 341 U. S.:

"Petitioner and others over a period of three days took four men to a paint shack on the company's premises and used brutal methods to obtain a confession from each of them. A rubber hose, a pistol, a blunt instrument, a sash cord and other implements were used in the project. One man was forced to look at a bright light for fifteen minutes; when he was blinded, he was repeatedly hit with a rubber hose and a sash cord and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the procedure was repeated. One was backed against the wall and jammed in the chest

with a club. Each was beaten, threatened, and unmercifully punished for several hours until he confessed."

A similar question arose in *Apodaca v. United States* (10th Cir., 1951), 188 F. 2d 932, 936, in which the Court stated:

"The first count in the indictment in this case did not merely charge that the accused conspired to assault and torture Byrd. And the second count did not merely charge that they assaulted and tortured him. Each went further. The first count charged in language too clear for misunderstanding the formation of a conspiracy to deprive Byrd, under color or pretext of State authority, of rights, privileges and immunities guaranteed to him by the Fourteenth Amendment by assaulting and torturing him in the manner set forth for the purpose of forcing him to confess the commission of a criminal offense. And the second count charged in equally clear language the substantive offense of depriving Byrd, under color or pretext of State authority, of such rights, privileges, and immunities by assaulting and torturing him for such purpose. Each count in the indictment followed the statute in its generalities; each charged an offense under the laws of the United States; and neither is open to the attack directed against it."

In *Apodaca v. United States, supra*, the evidence showed that the accused for more than two hours applied, clamped and squeezed a bicycle type lock and another type lock around a prisoner's testicles, inflicting upon him serious pain and bodily harm and injury, for the purpose of forcing him to confess that he had committed a criminal offense.

Undoubtedly, in those cases where the Government alleged the extortion of a confession by force and violence as the deprivation of a Constitutional right, it undertook to prove such an act. By contrast, when the Government has merely relied on evidence that the accused assaulted a prisoner in his custody, the indictment has specified the deprivation of Constitutional rights in different language.

For example, in *United States v. Jackson* (8th Cir., 1956), 235 F. 2d 925, the Constitutional rights were specified as:

“(1) the right not to be deprived of his liberty without due process of law; (2) the right and privilege to be secure in his person while in the custody of the State of Arkansas or an officer thereof; (3) the right and privilege to be immune from summary punishment by persons acting under color of the laws of Arkansas; and (4) the right and privilege not to be subject to punishment without due process of law.”

In *United States v. Walker, supra*, the Constitutional rights were specified as:

“(1) the right to be secure in his person, and to be immune from illegal assault and battery by the defendant and by other persons under the defendant’s direction and control; and (2) the right not to be assaulted by the said defendant and by other persons under the defendant’s control and direction; and (3) the right and privilege not to be subjected to punishment without due process of law.”

In *United States v. Jones* (5th Cir.), 207 F. 2d 785, the Government pleaded two different counts in the in-

dictment. In the first count, there was included an allegation that the accused struck a prisoner to coerce information concerning alleged offenses. In the second count, this allegation was omitted. The Court added that the Government would be put to proof on

“ . . . all the material allegations in the information including the willful character of the acts of the defendant and his intention to deprive said prisoners of their civil rights under the constitution and laws of the United States.” (207 F. 2d at 787.)

In sum, a line of demarcation exists between pleading an assault which wilfully deprives a prisoner of a Constitutional right and pleading the extortion of a confession, statement or information about an alleged offense by force and violence. Having elected to use language which is understood in a technical sense, the Government must conform its proof to the charge. (*United States v. Claflin* (1875), 25 Fed. Cas. No. 14, 789, 13 Blatchf. 178, on p. 436 of 25 Fed. Cas.)

There is sound reasoning to support such a line of demarcation. As recognized in *Williams v. United States*, *supra*, 341 U. S. at 101, where police beat a victim until he confesses, there is no doubt that the police have deprived the victim of a Constitutional right. The same conclusion does not readily follow from an assault on a prisoner. As stated in *Screws v. United States*, 325 U. S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495, there must first be a determination of all the circumstances attending the assault, including the malice of accused, the weapons used in the assault, its character and duration,

the provocation, if any, and the like, before it can be concluded that the accused had the purpose to deprive the prisoner of a Constitutional right, *e.g.*, the right to be tried by a court rather than by ordeal.

IV.

The Trial Court Abused Its Discretion in Excluding Appellant's Evidence to Impeach Witness Carlson During His Cross-Examination.

During the cross-examination of prosecution witness Carlson the appellant attempted to introduce Defendant's Exhibit C, a statement dated February 27, 1956, which appeared to impeach witness Carlson [R. 200-203]. The trial court rejected the offer [R. 203].

Although no further foundation was laid, the trial court reversed the ruling and admitted the statement at the end of the case [R. 274-275].

The time for admitting such an impeaching statement is within the discretion of the trial court. However, in this case Carlson was a critical prosecution witness, in fact, the only effective witness other than the two convicted felons. He was also an admitted perjurer who had stated he swore falsely to the Clark County grand jury. Under these circumstances the trial court should have exercised its discretion in favor of the appellant and permitted the impeachment during the cross-examination. It was reversible error for the trial court to defer the introduction of the document until the end of the trial, when its impact on the jury would be lost.

V.

The Trial Court Erroneously Admitted Evidence of Appellant's Confidential Communications to His Wife.

The trial court allowed witness Ramona Wolf to testify what she observed the appellant say to prisoner Gaither in her presence. At the time the witness was married to the appellant. Appellant objected that anything said by the appellant in his dealings with Gaither—if they were incriminating as to the appellant—was a confidential communication [R. 209-214]. Apparently the trial court deemed her position as an employee of the police department of North Las Vegas sufficient basis to render her competent as a witness against the appellant.

We respectfully submit that, although there is no precedent directly in point, this was a very unusual situation which required the court to respect the husband-wife confidential communication privilege.¹¹ Assuming, *arguendo* that the appellant talked or acted in a manner which is later used in a criminal proceeding to convict him of beating a prisoner, then it logically follows that he would not have done so in front of a witness in the police station, unless that witness was his wife whom he believed would not breach the confidence inherent in such a communication. In short, the only reason witness Wofe would have had anything to testify against the appellant was that she heard and saw matters which would have naturally been concealed from her except that she was the appellant's wife. Under these circumstances she was not a competent witness.

¹¹*Blau v. United States* (1951), 340 U. S. 332, 95 L. Ed. 306; *Pereira v. United States*, 347 U. S. 1, 98 L. Ed. 435, 74 S. Ct. 358.

VI.

The Trial Court Erroneously Amended the Indictment to Eliminate the Requirement That the Prosecution Prove That Appellant Procured a Confession by Force and Violence.

Section 242 of Title 18, United States Code, in its pertinent portion, applies to a defendant who

“ . . . under color of law, statute, ordinance, regulation or custom, wilfully subjects any inhabitant of any State, Territory, or district to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. . . .”

Applied to the instant case, *the offense would consist in the fact of the “wilful deprivation under color of State law of rights secured to prisoners by the Federal Constitution.”* (*United States v. Walker* (5th Cir.), 216 F. 2d 683, cert. den., 348 U. S. 959, 75 S. Ct. 450, 99 L. Ed. 748.)

In *United States v. Jones* (5th Cir.), 207 F. 2d 785, 787, the Court stated:

“ . . . a plea of not guilty by the defendant will join issue upon, and put the Government to the proof of, all the material allegations in the information, including the willful character of the acts of the defendant and his intention to deprive said prisoners of their civil rights under the constitution and laws of the United States.”

It is therefore imperative to determine the material allegations of the indictment in the instant case and in that manner gauge the burden of proof imposed on the Government by the defendant's plea of not guilty.

The indictment clearly sets forth that the prisoner in Count 1, Ray Lewis Sage, Jr., and the prisoner in Count 2, Coite Martin Gaither, Jr., were respectively inhabitants of a State of the United States. It sets forth that the action taken was done pursuant to the color of the State law of the State of Nevada. Both allegations were essential elements of the crime denounced by Section 242.

The indictment further sets forth the rights, privileges or immunities secured or protected by the Constitution of the United States, of which the respective prisoners were wilfully deprived. The rights are specified as follows:

“(1) The right and privilege to be secure in his person while in the custody of anyone acting under color of the laws of the State of Nevada,

“(2) The right and privilege to be immune from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws *for the purpose of obtaining a confession, statement, or information about an alleged offense*, and

“(3) The right and privilege to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Nevada, and not to be subjected to illegal punishment, force and violence by any person acting under color of the laws of the State of Nevada.” (Emphasis supplied.)

It was further charged in the indictment that appellant, while acting under color of Nevada law (in Count One), did beat with a flashlight, fists and elbows, and did kick with his feet the said Ray Lewis Sage, Jr., “all for the purpose and with the intent of depriving him of the Constitutional rights aforesaid” and (in Count Two)

did beat with fists and elbows, and did kick with his feet the said Coite Martin Gaither, Jr., "all for the purpose and with the intent of depriving him of the Constitutional rights aforesaid."

It is respectfully submitted that the indictment must be construed in such a manner as to require the Government to prove that the appellant extorted a confession, statement or information about an alleged offense by the use of force and violence (See Argument III(C)).

Absolutely nothing in the evidence or the trial court's instructions to the jury showed that the appellant procured a confession, statement or information about an alleged offense by the use of force and violence. By specifying the Constitutional rights by the use of the conjunctive "and," the indictment made the deprivation of each of the three Constitutional rights a material element of the charge.

The Government is precluded from striking out so essential an element of the indictment for it would result in the charge of a different offense than that found by the grand jury. It is an unqualified rule that an amendment to an indictment returned by the grand jury is in violation of the Fifth Amendment. (*Ex parte Bain* (1886), 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849; *Stewart v. United States* (9th Cir., 1926), 12 F. 2d 524; *Dodge v. United States* (2d Cir., 1919), 258 Fed. 300, cert. den., 250 U. S. 660, 40 S. Ct. 10, 63 L. Ed. 1194; *Heald v. United States* (10th Cir., 1949), 177 F. 2d 781.)

VII.

**The Trial Court Erred in Refusing Appellant's Motion
for a New Trial.**

Appellant's motion for a new trial included in its grounds all the errors of law which are discussed hereinabove and to which exception was duly taken [R. 280-299].

Conclusion.

For the reasons stated, the judgment of guilty as to appellant should be reversed and the cause remanded for a new trial.

Respectfully submitted,

MORTON GALANE,

Attorney for Appellant.

APPENDIX.

TABLE OF EXHIBITS.

<u>tiff</u>	<u>Description</u>	<u>Page of Identified</u>	<u>Record Offered</u>	<u>Received or Rejected</u>
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“		125	192	192
“		125	192	192
“		125	(Not offered)	
“		125	192	192
“		126	192	192
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“ “ “ “ “ “		218	219	219
<u>endant</u>				
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Statement made by Sage at NLV police station..		98, 270	99, 270	(Withheld ruling), 270
Signed statement by Carlson (Ident).....		197	200, 274	203 (rejected), 275 (received)
Signed statement by Carlson.....		199	200	203
Log records North L.V.....		252	252	253

No. 15865
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM CECIL POOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the
District of Nevada.

APPELLANT'S REPLY BRIEF.

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No. 15865
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM CECIL POOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's brief is replete with statements and arguments which should be rebutted if this Honorable Court is to have an opportunity to resolve the true issues presented by this appeal.

I.

Appellee's Treatment of the Facts.

Appellee has presented a "Counterstatement of the Case" which is marked by its failure to characterize the witnesses and the testimony in a manner which will enable the Court to determine the strength or weakness of the evidence of Appellant's guilt.

Nowhere in Appellee's brief can we find a reference to the fact that both of the complaining witnesses Sage and Gaither were convicted felons who had been subjected to imprisonment in the Nevada State Prison as a result of the Appellant's investigatory efforts. Nowhere in the

Appellee's brief can we find a reference to the fact that key witness Victor L. Carlson admitted that he committed perjury before the Clark County grand jury. Nowhere in the Appellee's Brief can we find that witness Carlson had signed, one inconsistent statement [Ex. C] before he learned of an impending grand jury investigation [R. 198]; indeed, the Appellee has misstated the facts by alleging in its brief (p. 7) that both of Carlson's statements were made in contemplation of the grand jury investigation in order to get the "heat off" and later by arguing that Exhibit C—made before Carlson found out about a grand jury investigation—was merely cumulative of Exhibit D—made after he learned of the grand jury investigation.

It was only by ignoring the character of the principal evidence that the Appellee was able to conclude that it is hard to imagine more positive and clear-cut evidence of the commission of a crime (Appellee's Br. pp. 25-27). Appellee first cites the testimony of Sage and Gaither, the convicted felons; then cites the corroboration offered by witness Carlson, the accomplice-perjurer; and then concludes that there was strong evidence of guilt. Even the testimony of Dr. French is distorted; for he could not give an opinion as to the cause of Sage's wounds [R. 80]. Yet Appellee would have the Court believe that he had corroborated the prosecution's case because he said it was possible for the injury to result from Sage getting out of a moving vehicle if he hit a pipe or gate pipes [R. 80] and that it was also possible for the bruises to have been caused by a flashlight [R. 81].

The significance of these omissions and distortions is obvious when we realize the standards established by the United States Court of Appeals for the Ninth Circuit in

determining whether evidence of guilt is “strong” or “weak.” We respectfully submit that the determination must be based on evidence *other than* the testimony of witnesses whose credibility is in doubt because they are convicted felons (Sage and Gaither) or an accomplice-perjurer (Carlson).

In the recent case of *Mims v. United States* (9th Cir., Mar. 28, 1958), No. 15,654, the Court of Appeals refused to find as a valid basis for reversal the failure of the trial court to instruct the jury that the testimony of an accomplice and a perjurer must be viewed with caution. The Court cited the failure of the defendant’s trial counsel to take exception to the charge. The Court further found that the error was not committed under such “exceptional circumstances” as to justify the appellate court to reverse on its own notice, because sufficient instructions had been given by the trial judge and the testimony of the accomplice and of the perjurer was supported and corroborated by other evidence. The Court stated on Slip Opinion, page 6 as follows:

“It is our opinion that there existed other material and substantial testimony in the case corroborating and strengthening the testimony of the accomplice Sabbath so as to make the evidence of defendant’s guilt ‘strong’ rather than ‘weak.’ This was sufficient evidence to permit the jury to find defendant guilty beyond a reasonable doubt *without the testimony* of either Sabbath or Barrett, or both of them.” (Emphasis supplied.)

The instant case is the exact opposite. There is virtually no evidence to permit the jury to find Appellant guilty beyond a reasonable doubt without the testimony of the convicted felons and the accomplice-perjurer. It

naturally follows that the evidence of Appellant's guilt is "weak"; and this conclusion must permeate our view of the entire case, because it is obvious that errors which were committed would have a "substantial influence" on the outcome of the case.

By a careful process of omission, Appellee has placed itself in an untenable position to argue:

(1) That the voluntary, unresponsive statement of the Clark County District Attorney regarding his reasons for advising against a Clark County indictment was "fairly innocuous in itself" (Appellee's Br. p. 27);

(2) That the trial judge's charge to the jury "hardly merits appellant's characterization that it constitutes 'plain error' " (Appellee's Br. p. 22);

(3) That short of having a television camera trained on the spot where the beatings occurred, it is hard to imagine more positive and clear-cut evidence of the commission of a crime (Appellee's Br. pp. 25-26);

(4) That no prejudice resulted from the trial judge's exclusion of documentary evidence to impeach witness Carlson during his cross-examination (Appellee's Br. p. 28).

However in *Mims v. United States, supra*, the Court implied that if the cited errors had consisted of the propounding of an improper question by government counsel and the failure of the trial judge to caution the jury on the credibility of an accomplice, both errors would have added up to "exceptional circumstances" justifying reversal; and the Court cited *United States v. Levi* (7th Cir., 1949), 177 F. 2d 827.

The United States Court of Appeals for the Ninth Circuit set forth the following test (quoting from *Kottekos v. United States* (1946), 328 U. S. 750, 763, 764), on Slip Opinion, pages 3-4:

“And the question is, not were they (the jury) right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury’s decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one’s own, in the total setting. (Citations omitted.) * * *

“If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.”

Therefore, when we answer the arguments in Appellee’s brief, we do so in the light of our analysis of the evidence that without the testimony of convicted felons Sage and Gaither and accomplice-perjurer Carlson there would have been nothing on which to base a conviction in this case.

II.

The Voluntary Unresponsive Statement of the Clark County District Attorney.

Appellee contends that no error occurred in the testimony of the Clark County District Attorney, because the Appellant's trial counsel could have anticipated the inadmissible answer (Appellee's Br. p. 23), the Appellee was not responsible for the error because the witness was not a Government witness (Appellee's Br. p. 24), the Appellee had a duty to clarify the reference to the witness' role in the state grand jury proceedings (Appellee's Br. p. 25) and the evidence of Appellant's guilt is strong (Appellee's Br. pp. 25-26).

First, Appellant's trial counsel could not have anticipated the answer, because the question propounded only sought a clarification of the witness' "participation in part" in the state grand jury proceedings. It did not seek an explanation of the reasoning used by the Clark County District Attorney to advise the state grand jury that it had no jurisdiction to issue an indictment.

Secondly, it is immaterial that the witness was a defense witness, because it is no answer that the Appellee was not responsible for the error. In *Nalls v. United States* (5th Cir., 1957), 240 F. 2d 707, 710, which granted a new trial because of a voluntary statement of a police officer, the Court of Appeals made it clear that the basis of the reversal was an unresponsive statement volunteered by City Policeman Scott,

“ . . . for which the Government was not responsible . . . ”

Third, the Government was not under a duty to have the witness explain his reasoning which he presented to

the Clark County grand jury. The most that could have been explained was the witness' role as a legal advisor to the grand jury.

III.

The Inadequate Jury Charge.

Appellee has confused the issues in its brief by merging separate and distinct propositions into one argument. In short, Appellee has imputed arguments to us which we had not made, for example:

(1) That the premise of Appellant's arguments is that the Appellee must prove that confessions were secured as a result of the brutality (Appellee's Br. pp. 12, 14-15);

(2) That Appellant contends that there cannot be a successful prosecution under 18 U. S. C. 242 without proof that the official succeeded in coercing the confession (Appellee's Br. p. 16).

These statements are unfair, because Appellant did not challenge the charge to the jury on this basis. Indeed, Appellant cited examples of cases which were based on the assault of a prisoner by an official custodian, as distinguished from the extortion of a confession by force and violence (Appellant's Main Br. pp. 40-42). True, Appellant did raise a question as to the interpretation of the indictment and Appellant contended that the indictment alleged the successful procurement of a confession by force and violence in support of Argument III that there was a variance between the indictment and the proof and Argument VI that the trial court amended the indictment in its charge. However, this contention was completely unrelated to Argument II which challenged the adequacy of the entire jury charge and added that

the error was sufficiently severe to justify reversal despite the failure of Appellant's trial counsel to take exception to it.

First, the jury charge was devoid of any cautionary instructions regarding the credibility of the convicted felons or the accomplice-perjurer.

Certainly when we consider the significance of this testimony in the instant case, "the better practice" to paraphrase *Holmgren v. United States* (1910), 217 U. S. 509, would have been for the trial judge to caution the jury to take into consideration the effect of the felony convictions on credibility¹ and to instruct the jury that the testimony of an accomplice and a perjurer are to be received with great caution and believed only when corroborated by other material testimony adduced in the case.²

The trial court failed to issue these cautionary instructions and thus left the jury free to treat the evidentiary record as one leaving no alternative to the jury but to believe it, when its true status was that of a record clouded by the questionable credibility of key witnesses.

Appellant repeats as we stated in our main brief that throughout the charge there is confusion as to which Constitutional right the prosecution must prove the prisoners were deprived of.

Furthermore, Appellee failed to respond to Appellant's contention that the trial judge took from the consideration

¹*Michelson v. United States* (1948), 335 U. S. 469, 482-483, 69 S. Ct. 213, 221-222, 93 L. Ed. 168; *Rosen v. United States* (1918), 245 U. S. 467, 38 S. Ct. 148, 62 L. Ed. 406; *Greer v. United States* (1918), 245 U. S. 559, 38 S. Ct. 209, 62 L. Ed. 469.

²*Mims v. United States* (9th Cir., 1958), No. 15,654.

of the jury the question whether the Appellant mistreated his prisoners, when he stated [R. 14]:

“ . . . then the ordeal to which the defendant, Pool, subjected both Sage and Gaither . . . constituted a violation of the Federal statute.”

IV.

The Delay in Admitting Exhibit C to Impeach Witness Carlson.

Appellee's argument that there was no reversible error in the trial court's temporary exclusion of evidence to impeach witness Carlson during his cross-examination includes the statement that the exclusion of Exhibit C was not prejudicial because Exhibit D had been admitted, Exhibit C was merely cumulative and that the jury had a full statement before it for the purpose of impeachment (Appellee's Br. pp. 28-29).

Appellee has ignored the fact that Exhibit C had been signed before witness Carlson learned of the grand jury investigation and therefore carried more weight than Exhibit D, which Carlson could at least attempt to explain away as having been made in contemplation of the grand jury investigation in order to get the "heat off." Indeed, Appellee has misstated the timing of Exhibit C at least twice in its brief (Appellee's Br. pp. 7, 29). Therefore, for the final time we state that on cross-examination witness Carlson admitted that he learned of the grand jury investigation one or two days after he signed the statement identified as Exhibit C [R. 198]. Therefore, Exhibit C was not merely cumulative of Exhibit D.

Appellee suggests on page 29 of its brief, footnote 10, that Appellant was inconsistent in alleging prejudice from the delay in the admission of Exhibit C and in another

point in the brief alleging that the jury was strongly impressed by certain statements made by the Clark County District Attorney simply because they were made at the end of the case. Appellee has clouded the issue. There is nothing inconsistent in contending that a written statement used to impeach a key witness should be introduced during his cross-examination or it loses its effectiveness and contending elsewhere that an oral statement made before the retirement of the jury carries great weight. These are mutually exclusive arguments and each may be proper under its own circumstances.

V.

The Improper Injection of a Juror's Affidavit Into Appellee's Brief.

Appellee has cited in its brief an affidavit of one of the jurors filed in connection with Appellant's motion for a new trial, which commented on the overwhelming character of the evidence of guilt (Appellee's Br. pp. 26-27). This was improper and should be stricken from Appellee's brief. It deserves no further argument. This is not the instrument to be employed to determine whether an error by the trial court meets the "substantial influence" test of the case of *Nims v. United States, supra*.

Indeed, Appellant out of respect for the well recognized principle that it is improper to impeach a jury verdict by affidavits relating to their deliberations did not even print as a part of the record that Appellant's affidavits in support of a motion for new trial. However, since Appellee has inserted the affidavit of a juror into its brief, we feel compelled to set forth in the appendix an affidavit which quotes the foreman of the jury, which convicted Appellant herein and which reveals the prejudice which prevailed among the jurors.

VI.

**The Prosecution's Case Clashes With the Policy of
the Federal Civil Rights Act.**

The witnesses relied on by the Appellee herein create a policy question which transcends this case and affects all prosecutions under the Federal Civil Rights Act. Offenses of this type are naturally committed in secrecy. Police officials guilty of brutality will not commit their illegal actions in view of witnesses. Consequently, the usual witnesses are the victims or accomplices.

However, in this case the Government has gone one step further. The victims have never asserted their innocence of the crime for which they were arrested. Indeed, they have both voluntarily admitted their guilt of felonies for which they were convicted and sentenced under the penal laws of Nevada. Both would naturally seek revenge against the police officials who apprehended them. Both can be challenged seriously by a jury on the issue of credibility.

The corroborating witness was more than an accomplice. He had been discharged from the police force. He had committed perjury in state grand jury proceedings. He had signed inconsistent statements. Needless to say, any intelligent jury if properly instructed could have disbelieved him.

The trial court gave no cautionary instruction on credibility. Obviously the jury believed these witnesses. And without putting up the warning signals, the court left the jury free to be impressed by testimony which appears overwhelming until dissected.

In turn, the Appellant was subjected to a prosecution of great danger to all police officials. The very persons

whom he imprisoned now confront him in a counter-prosecution. Witnesses whose credibility is in doubt due to time-honored principles of legal procedure are permitted to inflict the same punishment on the Appellant as he did on them when he prosecuted them for the crimes which they committed. We recognize that sometimes this is the only way to convict a guilty police officer. At the same time, the courts must protect a police officer from a revenge prosecution. And the danger is even more acute where such a prosecution is encountered for political motives by forces which were antagonized by the very same officer.

We sympathize with the aims of the Civil Rights Acts. We appreciate the function of the federal jurisdiction in this area of the penal law.

We also know that the surest way to destroy the effectiveness of this essential federal instrument is to strip the protection normally afforded to a local police officer by judicial omission and judicial error. The Congress of the United States did not intend to provide a remedy of revenge to felons convicted and imprisoned by state officials. This Honorable Court should make certain that a prosecution of this type is accompanied by procedural safeguards which achieve the true objectives of the United States Government.

Conclusion.

For the reasons stated, the judgment of guilty as to the Appellant should be reversed and the cause remanded for a new trial.

Respectfully submitted,

MORTON GALANE,

Attorney for Appellant.

APPENDIX.

In the United States District Court for the District of Nevada.

United States of America, Plaintiff, vs. William Cecil Pool, Edward Ellis Clifton, Defendants. Case No. 136.

AFFIDAVIT.

State of Nevada, County of Clark—ss.

Herman M. Greenspun, being duly sworn, deposes and says:

That immediately following the trial in the above captioned matter and after the jury had made its findings of guilty, he had conversation with the Foreman of the jury, C. L. Martin. That the said C. L. Martin advised him among other things that his, Martin's son was arrested by the police while hitch-hiking through a city in Arizona on the way home from college. That not only did the police refuse to permit his son to make a telephone call to his father in Las Vegas but did in fact administer a beating to him because of the request. The foreman advised that this was present in his mind at the time of the deliberation and further advised that, "These cops who disregard the rights of others and use brutality have to be taught a lesson."

HERMAN M. GREENSPUN.

Subscribed and sworn to before me this 29th day of October, 1957.

BARBARA J. GREENSPUN,

Notary Public.

My Commission Expires Mar. 17, 1960.

(Seal)

No. 15865

**In the United States Court of Appeals
for the Ninth Circuit**

WILLIAM CECIL POOL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEVADA**

BRIEF FOR APPELLEE

W. WILSON WHITE,
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HOWARD W. BABCOCK,
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PAUL P. O'BRIEN, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15865

WILLIAM CECIL POOL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEVADA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On October 5, 1956, appellant Pool and one Edward Ellis Clifton were indicted on two counts of violation of 18 U. S. C. 242. Count I charged that on or about February 27, 1956 they deprived one Ray Lewis Sage, Jr., of certain of his rights and privileges under the Fourteenth Amendment, in that, while acting under color of law, they beat him with a flashlight, fists and elbows and kicked him with their feet with the purpose and with the intent of depriving him of his constitutional rights. Count II alleged that on the same day appellant Pool deprived one Coite Martin Gaither, Jr., of certain of his rights and privileges under the Fourteenth Amendment, in that, while acting under color of law, he beat him with

fists and elbows and kicked him with his feet for the purpose and with the intent of depriving him of his constitutional rights.

The testimony adduced at the trial on behalf of the Government showed the following: Ray L. Sage, Jr., and Coite M. Gaither, Jr., were taken into custody on the morning of February 27, 1956. Detective Sergeant Victor L. Carlson of the North Las Vegas Police Department picked up Sage at his motel about 9 o'clock that morning (R. 51, 164). Gaither was taken into custody at his apartment between 10:30 and 11:30 a. m. of the same day (R. 129-130). Both victims in due course were taken to the North Las Vegas Police Department for questioning and subsequently Gaither was booked on a charge of vagrancy and burglary investigation (R. 48). The charge on Sage was burglary investigation (R. 48). Sage was intermittently questioned by appellant (who was then chief of police of the North Las Vegas Police Department) and others (R. 53, 54, 165), and so was Gaither (R. 133-134). When the questioning of Gaither proved fruitless, in that he denied participation in certain burglaries the police were investigating, he was ordered into a police car. Appellant got in beside him and detective Carlson was to drive (R. 134, 166). The three drove to a road by Nellis Air Base, turned off highway 91 on a gravel road and drove approximately a mile to a mile and a half to a big mound of dirt and stopped the car (R. 166, 134-135). During the trip appellant again interrogated Gaither about the burglaries (R. 167). When they arrived at their destination, appellant told Gaither to get out of the car and then struck Gaither

in the face (R. 167). Gaither continued to protest his innocence (R. 167). Appellant and Carlson both then beat and kicked Gaither a number of times (R. 136). Gaither was hit in the stomach area and kicked at the end of his spine and on the chest (R. 136). He was knocked down about six or eight times (R. 136-137). All during that time his hands were handcuffed behind his back (R. 137). Gaither was subjected not only to physical abuse but vulgarity and threats while the beating was being administered (R. 167-168, 135-138). After a while, when Gaither still maintained that he was innocent, appellant, Carlson, and Gaither got back into the car and returned to the North Las Vegas Police Department. They had been gone approximately 45 minutes to an hour. Ramona Wolf, wife and secretary of appellant corroborated Gaither's and Officer Carlson's testimony in this respect for she had seen appellant and Gaither go out to the car and had witnessed their return about an hour later. She stated that upon his return Gaither's face was very red and flushed (R. 212-213). When Gaither was subsequently admitted to the Las Vegas city jail, his stomach, neck, head and shoulders were "hurting pretty bad" (R. 142).

After Gaither had been returned to the police station, appellant told Sage to come outside to the car (R. 171). He there interrogated Sage further and in the course of the interrogation confronted him with Gaither and with the fact that he had been in a car with Gaither the night before (R. 171). Thereafter, appellant ordered Sage into the car, and Clifton, Carlson, and appellant also got in. Appellant

instructed Sage to get down on the floor boards of the back seat, threatening him with a pistol (R. 56-57, 171-172). They drove to the same location to which they had previously taken Gaither (R. 172). When they got out of the car appellant told Clifton to "work him over" (R. 172-173). Clifton started to hit Sage in the mouth and then beat him unmercifully with a flashlight (R. 172-174, 58). He struck Sage with the flashlight in the chest and abdomen between 25 and 100 times (R. 60, 173). Sage fell to the ground approximately 20 times begging Clifton not to strike him anymore (R. 61, 173). Appellant kicked Sage several times while the latter was down (R. 63, 173). Sage was handcuffed part way through the beating (R. 64, 173). Carlson testified that he warned appellant that an airplane flying overhead might see what was going on (R. 174). To avoid detection they drove to another place and continued to interrogate Sage (R. 174-175). Placing a pistol against Sage's temple, Clifton threatened to kill Sage if he did not tell the truth (R. 174-175). Sage repeatedly protested that he was not involved in the burglary job (R. 175).¹

The group then returned to the car and drove back to the rear of the North Las Vegas police station and appellant made arrangements to have Sage booked in the Henderson jail (R. 175-176). During the trip back Sage appeared to be hurt about the mid-section (R. 175). Officers Clifton and Carlson drove Sage

¹ Photographs of the area where the beatings were administered were identified at the trial by Carlson (R. 168) and by Gaither (R. 159-163).

to the Henderson jail at which time Clifton made a request that he have no phone calls, no visitors and that he be placed in maximum security (R. 122, 176). When Carlson and Clifton returned to the North Las Vegas police station appellant ordered them to make a statement to the effect that Sage had received his injuries from jumping out of the police car (R. 177-178).

While in the cell at the Henderson jail Sage had a fainting spell and asked to see a doctor. He was examined by a physician (R. 71). Doctor J. B. French, a surgeon (and also the Mayor of Henderson) testified that he examined Sage. He discovered that Sage's mouth was bruised and that he had a dozen or fifteen large bruises over his chest and abdomen and smaller bruises around both wrists and one ankle. Sage had extreme difficulty in breathing. The doctor feared that Sage had a ruptured spleen and a fractured rib (R. 78-79). Medication was administered to stop any internal bleeding (R. 78). Dr. French testified that in his opinion the type of injury Sage had incurred could have been caused by a person attempting to get out of a moving vehicle only if he hit a pipe or gate pipe directly (R. 80). However, he thought it possible for the bruises he saw to have been inflicted by a flashlight (R. 81). In the opinion of Dr. French, Sage was not in good condition; he definitely had some internal injury; he required immediate hospitalization (R. 85). Sage was in severe pain (R. 84).

Several slides and photographs taken of Sage's injuries were identified (R. 218-219), and it was brought out that the photographs and slides accurately

portrayed the nature of Sage's injuries as they had been observed on March 1 (R. 222-224). The deputy Sheriff of Clark County reported that when he examined the upper body of Gaither on February 29th he observed yellow greyish bruises on his chest, lower stomach and on the back of his right shoulder (R. 222).²

Subsequently, the investigation into the burglaries continued. After further interrogation and confrontation with a bag full of money taken from one of the stolen slot machines Gaither admitted he had had something to do with the burglary. A search was made for some of the incriminating evidence (a crow-bar and the pilfered slot machines). Gaither then was taken back to the police station where appellant attempted to implicate Gaither in other burglaries threatening him with "another ride." Gaither thereafter signed a written confession (R. 142-148).

The next day, February 28, 1956, Sage was returned to the North Las Vegas Police Department where appellant, Clifton, and Carlson continued the interrogation. Appellant did most of the talking (R. 86-87). Sage was informed that the police had secured a statement which implicated him in the burglaries. When confronted with this statement Sage agreed to sign a confession (R. 87). At this same time he was asked by appellant to give a statement concerning the cause of his injuries (R. 87-88). It was first sug-

² There also was evidence that appellant did not want Sage returned to the Henderson jail because of the bruises and that Sage was taken to the Las Vegas city jail instead (R. 181-182).

gested that he state that he jumped out of a car going at the rate of 50 miles an hour (R. 88). But he ultimately signed a statement to the effect that a slot machine had fallen on his chest and that no physical violence of any sort had been exerted against him (R. 89). Appellant told Sage he would put him on as a star witness if he would make a statement and also threatened to charge him with fourteen burglaries if he did not (R. 91-92).

When it became known that the grand jury was about to investigate the North Las Vegas police department, Carlson made two statements in contemplation of this grand jury investigation in order to get the "heat off" (R. 200-207). In early March, appellant, still attempting to cover up the atrocities, informed officers Clifton and Carlson that unless they "stuck" to their previous statements they would find themselves out in the desert (R. 187-189). Also Clifton and Carlson on instructions of appellant attempted to remove all of the evidence of the beatings by burning an old couch in a gully where the victims had been taken on February 27th (R. 192-193).

The evidence for the defense indicated the following: No one dictated any statement to Sage on the night of February 28 when he was being interrogated (R. 226). Witness Ferguson, Police Commissioner of the North Las Vegas police department, indicated that he did not see Sage's wounds until after they were pointed out to him (R. 227). Ferguson also testified that Gaither confessed when the large sack of money

was shown to him (R. 228), and that Gaither had said that his stomach was upset because he had been drinking too much (R. 231).

Witness Leeds, District Officer of the North Las Vegas police department, testified that Sage did not leave the station at any time between 9 a. m. and 2:30 p. m. on February 27 (R. 237), and that he did not observe Sage being physically mistreated. Leeds saw no excessive amounts of dirt and gravel on Gaither's clothes and when Gaither returned with appellant and Carlson the only thing he noticed was that Gaither had loosened his tie (R. 239).

Witness Fisher, a member of the North Las Vegas police department detailed to guard Sage at the hospital in Henderson, stated that Sage told him that if he had known that they were going to guard him he would not have gone to the hospital. On cross-examination he testified that he had no occasion to see the physical appearance of the body of Sage at the hospital (R. 267-268).

Several exhibits which tended to impeach the credibility of two of the government's witnesses were introduced by the defense. Exhibits A and B were prior statements signed by Sage (R. 97, 99, 270). Exhibit A indicated that Sage could not positively identify the officers who subjected him to the beatings, and Exhibit B contradicted his story as to how he received his injuries. Exhibits C and D contained prior statements made by witness Carlson which tended to exonerate the police department as to the cause of the victims' injuries (R. 203, 274).

At the conclusion of the Government's case appellant's motion for a judgment of acquittal was denied (R. 223-224). The motion apparently was not renewed at the close of all the evidence. The jury found appellant guilty on both counts of the indictment (R. 307),³ and appellant was sentenced to imprisonment for a period of one year on each count, the sentences to run concurrently (R. 309). A motion for a new trial was made, argued, and denied (R. 35). This appeal followed.

STATUTES INVOLVED

Title 18, section 242 provides:

Deprivation of rights under color of law.—Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Federal Rules of Criminal Procedure

Rule 26 provides:

Evidence.—In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of wit-

³ The codefendant Clifton was also found guilty, but did not appeal.

nesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 30 provides:

Instructions.—At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52 provides:

Harmless Error and Plain Error—(a) *Harmless Error.*—Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.*—Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

1. The substantive offenses were properly alleged in the indictment, tried before the jury, and explained

by the court in its charge. The indictment did not allege that appellant actually obtained confessions by coercion, but merely that one of his acts in depriving certain persons of their rights guaranteed by the Fourteenth Amendment was to exert force and violence for the purpose of obtaining a confession. That being true, it was not incumbent upon the District Court to instruct the jury that they had to find appellant not guilty unless they found that the confessions were the result of force and violence. In all respects the instructions to the jury were fair and adequate and they correctly stated the law. And appellant cannot complain in any event since he failed to object to the charge, as required by Rule 30, F. R. Cr. P.

2. No error was committed with respect to the statement of George Dickerson, district attorney of Clark County, to the effect that when he advised the state grand jury in connection with the beatings here involved he told them that they had no jurisdiction because at most a misdemeanor was involved. Not only did appellant fail to object to the question—which fairly indicated the answer—but even more, the witness being a defense witness, any prejudicial effect cannot be attributed to the Government. Furthermore, the evidence of guilt herein was so overwhelming that it would be unreasonable to suppose that the single statement of Dickerson might have significantly influenced the result.

3. There was no error in the court's temporary exclusion of evidence which tended to impeach the witness Carlson during his cross-examination. The trial court

has almost absolute discretion in determining the order of proof at the trial. This alone is a sufficient answer to appellant's claim of reversible error. Furthermore, appellant's assertion of prejudice in this respect is factually defective, for (1) another inconsistent statement made by the witness was then and there admitted, and (2) the statement here involved was also ultimately admitted.

4. The District Court properly admitted the testimony of appellant's former wife. Since she was not married to appellant at the time of trial she was not incompetent to testify. And no part of her testimony was privileged for all she saw and heard came to her attention in her capacity of secretary at the police department in the presence of a third person.

ARGUMENT

I

The substantive offenses were properly alleged in the indictment, tried before the jury, and explained by the court in its charge

Appellant's arguments II, III and VI, essentially make the same or closely similar points. Accordingly, they will be treated here as one.

It is asserted that there was (1) neither proof that the victims were forced to make a confession nor proof that the victims were denied the right to be tried in a duly constituted court and (2) that the court's charge failed to require the jury to find that such confessions were coerced or that the victims were deprived of the right to be tried in a duly constituted court. These assertions stem from the fact that the victims indicated that the confessions which they gave were not produced by the assaults, and

the fact that they ultimately were tried by a duly constituted court.

Preliminarily it should be stated—as appellant indeed concedes (Br. 28)—that no objection whatever was made to the charge as given. To overcome the positive mandate of Rule 30, F. R. Cr. P., which would be fatal to most of the points made, appellant relies on the “plain error” rule, codified in F. R. Cr. P. 52 (b). This Court has expressed its reluctance to permit the invocation of Rule 52 (b) to cure a failure to comply with Rule 30, except in very unusual circumstances. *Herzog v. United States*, 235 F. 2d 664 (9th Cir. 1956), *cert. denied*, 352 U. S. 844, 77 S. Ct. 54. It has been well said that the requirement of Rule 30 is not a trap for the unwary, but rather it “is of the very essence of the orderly administration of criminal justice.” *Enriquez v. United States*, 188 F. 2d 313, 316 (9th Cir. 1951). That this is true cannot be doubted, for if in fact error is committed by the trial court, that court should have an opportunity then and there to correct itself. Our system does not permit defendants silently to select alleged errors and submit them for the first time in the appellate court.

In *Herzog, supra*, this Court indicated that only a miscarriage of justice or a denial of a fair trial would be a sufficient basis for invoking the plain error rule. And the case as a whole, not simply the specific error alleged, must be examined to determine its import and gravity. In this connection it should be pointed out that the essence of appellant’s claim of error is that substantial rights were prejudiced because he was un-

der the impression that the Government to prove its case would have to show that the confessions were actually coerced; and that therefore he neglected to secure possible alibi witnesses (Br. 34). What appellant is saying is that throughout this case (indeed even in preparing for it) he felt sure that it was an essential element of the Government's proof to show that the confessions were the product of the brutal treatment. In view of that, what possible excuse can there be for his silence when the court in its charge failed to impose this burden upon the prosecution? Unless it were to be assumed that counsel was incompetent (and there is no claim of that) then the only explanation for this silence is that he deliberately elected to have the court persist in its error (if, as is claimed, there was error in this regard) in the hope of obtaining a reversal on appeal. A more cogent case for rigid adherence to the mandate of Rule 30 and a refusal to apply Rule 52 (b) would be hard to construct.

Accordingly, it is respectfully submitted, the questions raised in appellant's Arguments II, III and VI, are not properly presented for review by this Court.

In any event, no error, "plain" or otherwise, was committed by the District Court. The basic premise underlying appellant's major arguments is that the indictment herein must be construed as requiring the Government to prove that appellant actually extorted confessions by the use of force and violence (Br. 46). In other words, appellant reads the indictment as charging him with mistreatment crowned with success: the securing of confessions as a result of the

brutality. If this premise is accepted, then it might logically follow that the court failed to explain and define the offense (Argument II); that there was a variance between the indictment and the proof (Argument III); and that the court amended the indictment in its charge (Argument VI).

But, it is submitted, appellant's premise is wholly erroneous and so are his conclusions. The indictment does not, expressly or impliedly, charge appellant with the successful coercive securing of a confession. Rather, it charges a deprivation of rights secured by the Constitution, which, in one aspect, amount to the right to immunity "from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws for the purpose of obtaining a confession, statement, or information about an alleged offense" (R. 4, 5). It is obvious that this language of the indictment, which was read *in toto* to the jury (R. 6-9), neither suggests nor charges that appellant *obtained* a confession by use of force and violence, but only that the illegal acts deprived the victims of liberty without due process, which includes the right to be immune from force and violence applied *for the purpose of obtaining*, or in order to obtain, a confession.⁴ It is plain that the indictment cannot be read as appellant would have it.

⁴ There was ample evidence from which the jury could find that the victims had been subjected to police brutality the intent and purpose of which was to deprive them of the right to be immune from force and violence applied in order to secure a confession. For example, the record reflects repeated questions by appellant to Sage during the beating asking him whether he was ready to talk about the burglary (R. 60-66).

Moreover, it would be anomalous indeed if, before a successful prosecution could be had under 18 U. S. C. 242, it were required that the corrupt official succeed in his illegal purpose of coercing a confession. If this were true, a person who does not succumb to the brutalities inflicted on him and consequently does not confess, could have no vindication of the rights which were denied him. Only the weak would be able to see their tormentors successfully prosecuted. The right which is involved here is not the right to have a conviction reversed if a confession leading to such conviction is illegally coerced⁵ but rather the right to immunity from police brutality and illegal coercion in the first instance. 18 U. S. C. 242 is designed as a deterrent to prevent such violations, whether or not the culprit is successful. Willful brutality and mistreatment under color of law and office with the intent of depriving the victim of his Constitutional rights are as illegal and as heinous whether or not the objective of obtaining a confession is achieved.

It is significant that *Apodaca v. United States*, 188 F. 2d 932 (10th Cir. 1951), a case upon which appellant relies, had a similar allegation in the indictment, i. e., "for the purpose of forcing him to confess". The court, in discussing at length the question of the sufficiency of the evidence to support the verdict under the indictment did not relate that the defendants were successful in their illegal endeavor.

⁵ Other rules of law deal with that problem. See *Stein v. New York*, 346 U. S. 156, 73 S. Ct. 1077 (1953); *Hopt v. Utah*, 110 U. S. 574, 4 S. Ct. 202 (1884).

It simply found that the evidence was sufficient to support a conviction on the indictment. The fact is that Apodaca never succeeded in obtaining a confession, coerced or otherwise. Yet the court had no difficulty in sustaining the conviction.

Language from Justice Rutledge's concurring opinion in *Screws v. United States*, 325 U. S. 91, 65 S. Ct. 1031 (1945) also is particularly *apropos* to this point. Confronted with the contention that there was no deprivation of constitutional rights but rather a violation of state law he had this to say (325 U. S. at 114):

In effect, the position urges it is murder they have done, not deprivation of constitutional right. Strange as the argument is the reason. It comes to this, that abuse of state power creates immunity to federal power. Because what they did violated the state's law, the nation cannot reach their conduct. * * *

The defense is not pretty. Nor is it valid. The appellant here was not tried for a violation of state law—and neither was *Screws*. Yet in effect appellant assumes that because he failed to obtain a coerced confession (a proposition which in itself is dubious from the evidence (R. 144–147)) he has committed no offense. This defense is not pretty and it is not valid.

Had the appellant in this case succeeded in obtaining a confession such fact might well have had a bearing on the question of whether there was a deprivation of constitutional rights. But even then it would have been only one of the attendant circumstances from which the jury could find bad motive.

Cf. *United States v. Screws, supra*. But obviously this was not the only method of proving evil motive. And the jury was adequately instructed in this matter (R. 16-17).

In this connection it might bear reiterating precisely what the indictment alleges. Appellant was charged with the "deprivation of the rights and privileges secured * * * by the * * * Constitution * * * not to be deprived of * * * liberty without due process of law" (R. 4, 5). The indictment then specifies with particularity what rights and privileges encompassed within the great concept of the Fourteenth Amendment right were violated by this appellant (R. 4, 5):

to wit, the right and privilege to be secure in his person while in the custody of anyone acting under color of the laws of the State of Nevada, the right and privilege to be immune from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws for the purpose of obtaining a confession, statement, or information about an alleged offense, and the right and privilege to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Nevada, and not to be subjected to illegal punishment, force and violence by any person acting under color of the laws of the State of Nevada.

Finally, the indictment shows exactly in what manner appellant accomplished this illegal deprivation of rights: in the case of Sage, by beating and kicking

him, with fists, elbows, flashlight and feet (R. 4), and in the case of Gaither, by beating and kicking him with fists, elbows, and feet (R. 5-6).

That this is the usual, the "classical", method by which violations of 18 U. S. C. 242 are charged and proved, is unquestionable. In the leading case of *Williams v. United States*, 341 U. S. 97, 71 S. Ct. 576 (1951), the Supreme Court stated (341 U. S. at 101):

* * * where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court.

Even there, where a confession was in fact obtained by coercion, the right involved was described by the Court simply as the general right to be tried by a legally constituted court.

Similarly, in *Screws v. United States*, *supra*, the Court had this to say (325 U. S. at 106):

* * * it is plain that basic to the concept of due process of law in a criminal case is a trial—a trial in a court of law, not a "trial by ordeal." *Brown v. Mississippi*, 297 U. S. 278, 285. It could hardly be doubted that they who "under color of any law * * *" act with that evil motive violate § 20 [now § 242]. Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him.

In the instant case, appellant was informed in the indictment and the jury was informed in the charge not only of the general constitutional right involved (the Fourteenth Amendment); but the specific "included" rights were fully detailed and the factual pattern of the deprivation was alleged, charged and proved. This was even more than appellant was entitled to, for as *Screws* indicates, it is necessary to spell out the specifics of the constitutional rights involved only in the charge (as distinguished from the indictment).

The instructions here were in full compliance with the requirements laid down in *Screws* and *Williams*.⁶ It was made unequivocally clear that appellant was on trial not for any violation of the laws of Nevada, not for assault under any law of the United States, but solely for violating the right of the victims not to be deprived of liberty without due process in violation of the Fourteenth Amendment (R. 10-11). The court further told the jury that certain specific constitutionally protected rights were involved, the deprivation of which had to be proved before appellant could be found guilty (R. 13).⁷ The court then defined the

⁶ It is a fact of some significance that the jury instructions in the instant case were patterned after those which were upheld in *Crews v. United States*, 160 F. 2d 746, 750 (5th Cir. 1947).

⁷ At one point appellant suggests that the court was required to give a specific charge on each of the three rights enumerated in the indictment. Even aside from the fact that they are concomitant parts of the right to an orderly trial and not a trial by ordeal, this contention is without merit. Appellant gives as the reason for such requirement the fact that the rights were pled in the conjunctive (Br. 46). Even in the case where a statute enumerates specific acts in the disjunctive, all of them

term "wilfully" in words highly favorable to appellant, charging that to convict the jury had to find that appellant

* * * had in mind the specific purpose of depriving [the victims] of a Constitutional right, that is, to deprive [them] of the right to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed (R. 16).^s

In its summarization, the court again emphasized what the Government had to show in addition to the commission of the specific acts alleged in the indictment (R. 18):

1. Were the victims taken into custody under color of law?
2. Did the defendants specifically intend to deprive the victims of a constitutional right guaranteed them by the Constitution?
3. Have the elements been proved beyond a reasonable doubt?

It is apparent that, reading the charge as a whole,⁹ it defined and explained with great care and accuracy

may be pled in the indictment in the conjunctive even though the proof supports only one. *Heflin v. United States*, 223 F. 2d 371 (5th Cir. 1955); *United States v. Krepper*, 159 F. 2d 958 (3d Cir. 1946), *cert. denied*, 330 U. S. 824, 67 S. Ct. 865 (1947); *Price v. United States*, 150 F. 2d 283 (5th Cir. 1945), *cert. denied*, 326 U. S. 789, 66 S. Ct. 473; *Bailey v. United States*, 5 F. 2d 437 (5th Cir. 1925), *cert. dismissed*, 269 U. S. 589, 46 S. Ct. 12; *O'Neill v. United States*, 19 F. 2d 322 (8th Cir. 1927).

^s See also, at R. 17: "The proof of a general intent to do Sage and Gaither wrong is not sufficient, but a specific intent to deprive them of a Constitutional right is a burden the law casts upon the Government in this case."

⁹ Compare, appellant's brief, pp. 32-33.

the elements of the prosecution's proof. It hardly merits appellant's characterization that it constitutes "plain error." In fact it was a careful, accurate and fair charge, free from error.

II

No error occurred in connection with the testimony of George Dickerson

Appellant complains of prejudicial error in the testimony of George Dickerson, district attorney of Clark County. The circumstances under which this testimony was given were as follows: Dickerson was called as a witness on behalf of appellant's codefendant Clifton. Clifton's counsel asked Dickerson whether he had had occasion to advise the Clark County grand jury regarding an investigation of the North Las Vegas Police Department in the Spring of 1956 with reference to the beating of two prisoners held in the custody of the North Las Vegas Police Department in February and March, 1956 (R. 257-258). Dickerson replied "In part, yes" (R. 258). Thereafter counsel sought to introduce through the witness the original of a statement signed by Sage which had been submitted to the Clark County grand jury, and ultimately this statement was produced and received in evidence (Exhibit B) (R. 270). On cross-examination by the Government the prosecutor asked the witness what he meant when he stated that he had participated "in part" in the matter of the presentation of this matter to the Clark County grand jury. Dickerson replied, "I was not present during any time when the evidence was submitted. I was present outside after the conclusion of the matter. Questions as

to the legal problems involved, as to what crimes, if any, could be determined by the grand jury were asked of me, at which time I informed the grand jury that it was without jurisdiction to entertain any action in this regard, in that the evidence adduced constituted at the most a misdemeanor offense; that the grand jury is an arm of the district court and can return an indictment only on matters tried with the district court" (R. 271). Counsel for appellant then objected and demanded that the answer be stricken on the ground that the witness's legal opinion in the matter of the state law of Nevada was not proper. The court ruled that inasmuch as counsel had permitted the question to go in without objection, he could not for the first time complain after the answer to the question turned out to be unfavorable to his client (R. 271-272). It is this ruling of the trial court which appellant considers to be reversible error.

The court's ruling was correct not only on the narrow ground stated but for many other reasons as well. Obviously when the witness was requested to explain what he meant by his observation that he had participated in part in the matter of the presentation of the case to the county grand jury, an answer explaining the role of the witness and the grand jury proceedings themselves had to be anticipated. No doubt, counsel did not object because he felt that the witness might simply reveal that as a result of his advice, the grand jury did not indict. On this, he gambled and lost, for the witness gave a reason for his advice which was perhaps not

as favorable as counsel might have expected. But in any event, it seems clear that having stood idly by while the question calling for just such an answer was asked, appellant could not complain after the answer itself had gone into the record.

Moreover, and perhaps more basically, it is difficult to see how the Government could be charged with this matter at all, even if, *arguendo*, appellant's theory of error were assumed to be justified. *George Dickerson was not a Government witness*. He was called by the defense. He never became a witness for the prosecution at this trial and, except for the fact that he happens to be a state law enforcement officer, he has no ties and no connection with the Government in this case. Appellant cites no case in any court and appellee has been unable to find any decision holding that an improper volunteered statement by a defense witness—no matter who he might be—could be imputed to the prosecution so as to serve as a basis for reversing a conviction. There is sound reason for this lack of authority. It has always been true that a party is responsible for the witnesses it calls. If the rule were otherwise, abuses and schemes for inducing reversible error too manifold to be imagined could, and no doubt would, occur. It has never been held that a witness becomes a witness hostile or adverse to the defense by the mere fact that he happens to be engaged in law enforcement for another sovereign or even for the same sovereign. Hostility of a witness even for cross-examination purposes must first be established by his behavior on the stand, and a claim of surprise

is required. *Young v. United States*, 97 F. 2d 200 (5th Cir. 1938); cf. *Beasley v. United States*, 218 F. 2d 366, 368 (D. C. Cir. 1954), *cert. denied*, 349 U. S. 907, 75 S. Ct. 584 (1955). In the instant case it was not claimed at any time during the trial that Dickerson was hostile to the defense. His testimony therefore cannot be attributed to the Government.

It must be remembered also that what occurred between the district attorney and the Clark County grand jury was brought into the trial not by the Government but by the defense. It was defense counsel who first asked Dickerson about the grand jury investigation of the beating of the two prisoners (R. 257). Appellant states that he had to raise this matter in order to lay a foundation for his request for the original of Sage's statement. That may well be, or it may also be that an attempt was being made subtly to indicate to the jury in the instant case that this matter had previously been taken up by a state grand jury without any positive result. In any event, since the defense had opened up the subject it was the right, and indeed the duty of the Government to clarify the reference to Dickerson's role in the state grand jury proceedings.

Appellant refers to the proposition that "the evidence of guilt in this case was not clear" (Br. 21), in an effort to bring himself without the generally recognized doctrine that where improper statements are volunteered by a Government witness, the appellate court will reverse only if it can reasonably be assumed that absent such statement, the jury would probably not have convicted. Short of having a tele-

vision camera trained on the spot where the beatings occurred it is hard to imagine more positive and clear-cut evidence of the commission of a crime (see generally, Counterstatement of Facts, at pp. 2-4). Sage and Gaither, the two victims of appellant's acts, testified in considerable and graphic detail as to the events preceding, surrounding and following the beatings (R. 58-71, 135-137). Sage's testimony in regard to the brutality inflicted upon him was corroborated by that of Dr. French, who examined Sage and found a great many bruises and other injuries (R. 77-79, and see also and especially his testimony under cross-examination at R. 81-82). Both Sage's and Gaither's testimony was corroborated by Detective Sergeant Carlson, an accomplice of appellants, who was present during the beatings and who struck some of the blows himself (R. 167-174). Sage's story was further corroborated by the photographs and slides taken of him in his injured condition (R. 222-224). Finally, appellant's own secretary (his former wife) corroborated portions of Sage's and Gaither's testimony (R. 212-214). Opposed to this overwhelming evidence, appellant advances nothing more than the fantastic story that Sage received his injuries by attempting to jump out of a police car travelling at the rate of 50 miles per hour or that the injuries resulted from the fact that a slot machine fell on his chest. Truly, as one of the jurors said in an affidavit filed in connection with appellant's motion for a new trial, "with the evidence presented to the jury, we had no choice but to render the verdict we did. There was no argument in the juryroom whatsoever, and that had

the same evidence been presented against my own brother I would have to vote as I did" (R. 27). A feeling such as that could hardly have been caused or significantly influenced by the comment of Dickerson that he had informed the grand jury that "at the most, a misdemeanor might have been committed."

This comment was fairly innocuous in itself; in the setting of this case to assume that it might have been responsible for the conviction would be wholly unwarranted.

III

There was no reversible error in the trial court's temporary exclusion of evidence to impeach Witness Carlson during his cross-examination

Appellant offered impeaching evidence (Exhibit C) during the cross-examination of the witness Carlson (R. 200). The trial court excluded it, at that time, on the ground that a proper foundation had not been laid for its admission (R. 200-203). Subsequently the exhibit was admitted (R. 274-275).

Appellant concedes that the time of admitting evidence in general and an impeaching statement in particular is within the discretion of the trial court (Brief p. 42). Of course this is so, no principle of law being more firmly established than that the trial court has the widest possible discretion in determining the order of proof. *Philadelphia and Trenton Ry. v. Stimpson*, 39 U. S. 448, 462 (1840); *Brattellien v. United States*, 147 F. 2d 888, 893 (8th Cir. 1945) ("wholly within the discretion of the trial court"); *United States v. Manton*, 107 F. 2d 834, 844 (2nd Cir. 1939), *cert. denied*, 309 U. S. 664, 60 S. Ct. 590; *Tingle v. United States*, 38 F. 2d 573, 575 (8th Cir.

1930). No facts are shown or are apparent which would warrant the conclusion that the trial court abused its discretion in this case.

Aside from this controlling factor of the District Court's discretion and the fact that no abuse has been shown, there is yet another, equally basic infirmity in appellant's argument. The argument assumes that the temporary exclusion of this impeaching evidence was prejudicial. Obviously, any error, assuming *arguendo* there was error, must affect substantial rights of the appellant before reversal could be expected. F. R. Cr. P. 52 (a).

As previously stated, the principal purpose of this offer of evidence was to impeach witness Carlson. At the time Exhibit C was temporarily excluded, the court admitted into evidence Exhibit D (R. 203), which was essentially of the same purport as Exhibit C. No tactical advantage lost by the momentary exclusion of Exhibit C was substantial, for the jury had before it at that time evidence (Exhibit D) which was as impeaching of the credibility of Carlson as was Exhibit C. Both exhibits were designed to demonstrate that Carlson had previously made statements at variance with his trial testimony—statements exculpatory to appellant. Carlson explained that both documents were drawn up “to get the heat off us from the County grand jury” (R. 198–199). Having Exhibit D before it, the jury positively knew that on at least one occasion Carlson had told a story conflicting with his trial testimony, and they further knew, from the reference to the fact that there was an Exhibit C which was “a statement we had to make under direc-

tion, on order, from Pool and Clifton, to get the heat off us from the County grand jury" (R. 198) that there was another statement substantially of the same import. Accordingly, Exhibit C was merely cumulative. In fact, it merely presented in capsule form what Exhibit D contained. Exhibit D was much more comprehensive, hence more persuasive as an impeaching document. The action of the court could hardly be said to have affected any substantial rights or prejudiced appellant in any way. And, it should be remembered, Exhibit C *was* subsequently admitted into evidence.¹⁰

There was neither error, nor abuse of discretion, nor prejudice.

IV

The district court properly admitted the testimony of appellant's former wife

Ramona Wolf, appellant's former wife, was called to testify by the prosecution concerning her observations at the police department in her capacity as secretary to Chief Pool, the appellant. After preliminary questioning, appellant moved that she not be permitted to testify against her former husband on grounds of incompetency. And he further suggested that a question of confidential communications was thus raised (R. 209).¹¹

¹⁰ In another connection, appellant complains (Br. 21) that certain allegedly damaging evidence was admitted at the end of the trial, which, he implies, was prejudicial because a matter would more likely remain impressed in the minds of the jurors if they heard it just before retiring than otherwise. It may not be amiss to point out that Exhibit C was the last fragment of evidence admitted at the trial (R. 274-275).

¹¹ Actually it is not too clear on which of the two grounds appellant relied.

Obviously no question of witness Wolf's competency was involved, for at the time of his trial she was no longer appellant's wife (R. 209). Divorce removed the bar of incompetency. *Pereira v. United States*, 347 U. S. 1, 6, 74 S. Ct. 358 (1953). Furthermore, at this juncture of the trial no question of confidential communications could be raised for the witness had not been asked to reveal any information that was in fact privileged (R. 207-208). The trial court so found (R. 210). The court further ruled that the witness would not be allowed to testify as to matters in the nature of confidential communications between herself and her former husband (R. 210), and the prosecutor, before proceeding with the interrogation, instructed the witness not to answer with respect to any matter which was in the nature of a confidential communication between herself and appellant (R. 210).

During the subsequent testimony of the witness no objection whatever was made by the appellant.¹² Accordingly, even if it were assumed that the witness revealed privileged information appellant cannot now assert error in its admission. If the privilege could have been claimed, appellant should have sought a ruling on the specific testimony he wanted excluded.¹³

In any event the testimony given by the witness Wolf did not violate the privilege protecting private

¹² This may throw some light on whether appellant believed any of the testimony was privileged.

¹³ Incidentally appellant has not complied with Rule 18 (d) of this Court since he failed to indicate the full substance of the evidence allegedly erroneously admitted. *Gowdy v. United States*, 207 F. 2d 730 (9th Cir. 1953).

communications between husband and wife. Essentially her testimony (R. 211-215) involved only what she observed at the police station. In the few instances when the witness was asked to testify as to what the appellant said to her she was asked to state preliminarily who was present at that time; and in every case Gaither, one of the victims, was present (R. 212).

It is undoubtedly true that as a general rule marital communications are presumed to be confidential. But this presumption is overcome by facts showing the statements were not intended to be private. The Supreme Court held in *Pereira v. United States*, *supra*, that the presence of a third party negatives the presumption of privacy.¹⁴ See also, *Wigmore*, Evidence, § 2336; *Wolfe v. United States*, 291 U. S. 7, 14, 54 S. Ct. 279 (1934); *Himmelfarb v. United States*, 175 F. 2d 924, 939 (9th Cir. 1949) *cert. denied*, 338 U. S. 860, 70 S. Ct. 103 (attorney-client privilege); *Tabbah v. United States*, 217 F. 2d 528 (5th Cir. 1954). The above cited decisions further indicate that before the privilege attaches to any communication it must have been made by virtue of the marital relation. In the instant case nothing was said or done under circumstances surrounding it with any of the indicia of confidentiality.

The witness in her testimony related only the following observations she made in her capacity as typ-

¹⁴ The applicable law in determining competency or privilege in federal criminal cases is "the common law as * * * may be interpreted by the Courts of the United States in the light of reason and experience." F. R. Cr. P. 26.

ist, chief stenographer, and secretary for the North Las Vegas police department: Gaither was brought to the police station on the morning of February 27. After interrogating Gaither for a while appellant dictated a statement to her which Gaither signed. Then appellant told Gaither that they would go for a ride and the two men left the station. After an hour or so they returned and she observed that Gaither's face was then flushed and red. As far as Sage is concerned, she only saw him once on February 27, sitting in a police car with appellant Clifton and Carlson. This was the extent of her testimony (R. 211-215).¹⁵ Clearly, none of this was a confidential communication of the kind protected from disclosure as an incident of the marital relationship.

Finally, it has been held that the privilege in question attaches in general only to utterances not acts. *Pereira v. United States*, *supra*, 347 U. S. at 6. Aside from the fact that appellant told the witness to take a statement from Gaither which was dictated by Pool, none of her testimony involved any communications directed to her.¹⁶ The innocuous request to take dictation can hardly be construed as a confidential communication, for it obviously did not in any sense come to her by virtue of the marital relation, but rather by virtue of the fact that she was appellant's secretary. In fact, nothing to which she testified came to her in any other capacity.

¹⁵ There was no cross examination (R. 215).

¹⁶ The content of the statement dictated was not revealed by the witness in her testimony.

Accordingly, it is submitted that there is no merit to appellant's complaint in regard to Ramona Wolf's testimony.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment below be affirmed.

W. WILSON WHITE,
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HOWARD W. BABCOCK,
United States Attorney,
HAROLD H. GREENE,
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Attorneys,
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JUNE 1958.

No. 15865

United States
Court of Appeals
For the Ninth Circuit

WILLIAM CECIL POOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

FILED

MAR 12 1958

PAUL P. O'BRIEN, CLERK



No. 15865

**United States
Court of Appeals
For the Ninth Circuit**

WILLIAM CECIL POOL,

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**Appeal from the United States District Court
for the District of Nevada**

THEORY

CHAPTER I

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Nevada

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM CECIL POOL, EDWARD ELLIS
CLIFTON,

Defendants.

INDICTMENT FOR VIOLATION
SEC. 242, TITLE 18, USC

The Grand Jury Charges:

Count One

That on or about February 27, 1956, at a point near Nellis Air Force Base, in Clark County, Nevada, and elsewhere in Clark County, Nevada, and within the jurisdiction of this Court, the defendants, William Cecil Pool, who was then and there Chief of the North Las Vegas, Nevada, Police Department, and Edward Ellis Clifton, who was then and there a Captain of the North Las Vegas, Nevada, Police Department, did, while acting under color of the laws, statutes, ordinances and regulations of the State of Nevada, and of the City of North Las Vegas, Nevada, creating the offices and positions aforesaid and prescribing the duties thereof, wilfully subject Ray Lewis Sage, Jr., an inhabitant of the State of West Virginia, to the deprivation of the rights and privileges secured to

him and protected by the Fourteenth Amendment to the Constitution of the United States not to be deprived of his liberty without due process of law, to wit, the right and [2*] privilege to be secure in his person while in the custody of anyone acting under color of the laws of the State of Nevada, the right and privilege to be immune from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws for the purpose of obtaining a confession, statement, or information about an alleged offense, and the right and privilege to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Nevada, and not to be subjected to illegal punishment, force and violence by any person acting under color of the laws of the State of Nevada;

That is to say, that at the time and place aforesaid, the defendants, William Cecil Pool and Edward Ellis Clifton, while acting under color of law as aforesaid, did beat with a flashlight, fists, and elbows, and did kick with their feet the said Ray Lewis Sage, Jr., all for the purpose and with the intent of depriving him of the Constitutional rights aforesaid.

In violation of Section 242, Title 18, United States Code.

Count Two

That on or about February 27, 1956, at a point near Nellis Air Force Base, in Clark County,

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Nevada, and elsewhere in Clark County, Nevada, and within the jurisdiction of this Court, the defendant William Cecil Pool, who was then and there Chief of the North Las Vegas, Nevada, Police Department, did, while acting under color of the laws, statutes, ordinances and regulations of the State of Nevada, and of the City of North Las Vegas, Nevada, creating the office and position aforesaid and prescribing the duties thereof, [3] wilfully subject Coite Martin Gaither, Jr., an inhabitant of the State of South Carolina, to the deprivation of the rights and privileges secured to him and protected by the Fourteenth Amendment to the Constitution of the United States not to be deprived of his liberty without due process of law, to wit, the right and privilege to be secure in his person while in the custody of anyone acting under color of the laws of the State of Nevada, the right and privilege to be immune from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws for the purpose of obtaining a confession, statement, or information about an alleged offense, and the right and privilege to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Nevada, and not to be subjected to illegal punishment, force and violence by any person acting under color of the laws of the State of Nevada;

That is to say, that at the time and place aforesaid, the defendant, William Cecil Pool, while acting under color of law as aforesaid, did beat with

fists and elbows, and did kick with his feet the said Coite Martin Gaither, Jr., all for the purpose and with the intent of depriving him of the Constitutional rights aforesaid.

In violation of Section 242, Title 18, United States Code.

A True Bill:

/s/ ANGELO J. MOUZR,
Foreman.

/s/ HOWARD W. BABCOCK,
Assistant United States
Attorney.

[Endorsed]: Filed October 5, 1956. [4]

[Title of District Court and Cause.]

CHARGE

Ladies and gentlemen of the Jury, the United States Attorney has filed in this Court an indictment in two counts against William Cecil Pool and Edward Ellis Clifton, the material part of the indictment being as follows:

Count One

On or about February 27, 1956, at a point near Nellis Air Force Base, in Clark County, Nevada, and elsewhere in Clark County, Nevada, and within

the jurisdiction of this Court, the defendants, William Cecil Pool, who was then and there Chief of the North Las Vegas, Nevada, Police Department, and Edward Ellis Clifton, who was then and there a Captain of the North Las Vegas, Nevada, Police Department, did, while acting under color of the laws, statutes, ordinances and regulations of the State of Nevada, and of the City of North Las Vegas, Nevada, creating the offices and positions aforesaid and prescribing the duties thereof, wilfully subject Ray Lewis Sage, Jr., an inhabitant of the State of West Virginia, to the deprivation of the rights and privileges secured to him and protected by the Fourteenth Amendment to the Constitution of the United States not to be deprived of his liberty without due process of law, to wit, the right and privilege to be secure in his person while in the custody of anyone acting under color of the laws of the State of Nevada, the right and privilege to be immune from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws for [13] the purpose of obtaining a confession, statement, or information about an alleged offense, and the right and privilege to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Nevada, and not to be subjected to illegal punishment, force and violence by any person acting under color of the laws of the State of Nevada;

That is to say, that at the time and place aforesaid, the defendants, William Cecil Pool and Ed-

ward Ellis Clifton, while acting under color of law as aforesaid, did beat with a flashlight, fists, and elbows, and did kick with their feet the said Ray Lewis Sage, Jr., all for the purpose and with the intent of depriving him of the Constitutional rights aforesaid.

Count Two

On or about February 27, 1956, at a point near Nellis Air Force Base, in Clark County, Nevada, and elsewhere in Clark County, Nevada, and within the jurisdiction of this Court, the defendant William Cecil Pool, who was then and there Chief of the North Las Vegas, Nevada, Police Department, did, while acting under color of the laws, statutes, ordinances and regulations of the State of Nevada, and of the City of North Las Vegas, Nevada, creating the office and position aforesaid and prescribing the duties thereof, wilfully subject Coite Martin Gaither, Jr., an inhabitant of the State of South Carolina, to the deprivation of the rights and privileges secured to him and protected by the Fourteenth Amendment to the Constitution of the United States not to be deprived of his liberty without due process of law, to wit, the right and privilege to be secure in his person while in the custody of anyone acting under [14] color of the laws of the State of Nevada, the right and privilege to be immune from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws for the purpose of obtaining a confession, statement, or information about an alleged offense,

and the right and privilege to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Nevada, and not to be subjected to illegal punishment, force and violence by any person acting under color of the laws of the State of Nevada;

That is to say, that at the time and place aforesaid, the defendant, William Cecil Pool, while acting under color of law as aforesaid, did beat with fists and elbows, and did kick with his feet the said Coite Martin Gaither, Jr., all for the purpose and with the intent of depriving him of the Constitutional rights aforesaid.

To both counts of this indictment defendant Pool has entered a plea of not guilty, and to Count I of the indictment defendant Clifton has entered a plea of not guilty. These make up the issues that you are to try. The Government by the indictment filed, charging the accused, and the defendants by their pleas of not guilty, denying every material allegation of the indictment.

Notwithstanding this indictment these defendants, as do all defendants in criminal cases, come into this court clothed in the presumption of innocence, which presumption of innocence remains and abides with them throughout the trial, unless and until the Government has, by competent evidence, convinced the minds of every individual juror of the guilt of the accused beyond a reasonable doubt. A reasonable doubt, ladies and gentlemen,

means just exactly what the term implies—a doubt that would appeal to a [15] reasonable man; a doubt for which you can give yourself a reason. It does not mean an idle, whimsical or fanciful doubt, but a real well-founded doubt.

There are certain matters the court feels it would make clear to you at the outset. The court desires that you clearly understand that the defendants, William Cecil Pool and Edward Ellis Clifton, are not here on trial for a violation of any law of the State of Nevada; for assault or for any other offense that may be charged against them under the laws of Nevada. Neither are the defendants on trial for assault under any law of the United States of America. Defendant Pool is on trial for depriving Ray Lewis Sage, Jr., and Coite Martin Gaither, Jr., of certain rights, privileges and immunities secured and protected to him by the Constitution of the United States, and Defendant Clifton is on trial for depriving Ray Lewis Sage, Jr., of certain rights, privileges and immunities secured and protected to him by the Court of the United States. The Fourteenth Amendment to the Constitution of the United States provides that “no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” This Constitutional provision also provides that Congress may pass appropriate legislation carrying into effect the provisions of the Fourteenth Amendment, which I have just read to you. After the the adoption of the Fourteenth Amendment to the Constitu-

tion, many years ago Congress passed a law which provides that "whoever, under color of any law, statute, ordinance, regulation or custom, wilfully subjects or causes to be subjected, any inhabitant of any State, territory or district, to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution and [16] laws of the United States * * *" shall be punished as the law provides.

The Constitutional provision which I have just read you assures to every citizen of these United States the right and privilege not to be deprived of liberty without due process of law, under color of any law, statute, ordinance, regulation or custom of any State. We are also secure in the right not to be subjected to punishment, pain or penalties other than those prescribed for every person alike. This includes the right to be tried upon a charge upon which one may be arrested—to be brought by due process of law into a court of the State and if found guilty to be sentenced and punished in accordance with the laws of the State. All these rights were secured to Sage and Gaither along with you and me and every one else by the Constitution of the United States, and the Federal Statute under which this indictment is filed fixes the penalty for anyone, who, under color of State authority, denies to anyone of us any of these rights.

The court also desires that you clearly understand that the statute upon which this prosecution is based was not intended to cover and does not

cover personal and individual acts of a citizen wrongfully depriving another citizen of the Constitutional rights guaranteed to him by the Fourteenth Amendment. The statute applies only to one who acts under guise or color of authority of State law and thus brings about the illegal deprivation of Constitutional rights. The statute was not designed to reach, and does not reach the personal individual acts of one person towards another, when the act is not done under color of State law, even though the person committing the act is the holder of a public office. However, it is the [17] law that any misuse of power possessed by virtue of State law, made possible only because the wrongdoer is clothed with authority of State law, is action taken under color of State law. It is important that you keep clearly in mind the legal distinction which I have just pointed out to you between the personal and individual acts of a citizen holding a public office and the illegal misuse of power possessed by virtue of his office, in determining the guilt or innocence of these defendants.

This brings us to the question whether or not Sage was taken into custody by the defendants Pool and Clifton, and whether or not Gaither was taken into custody by Pool, by virtue of the authority vested in Pool and Clifton as officers of the law. An officer of the law does not have the power to divest himself of his official authority in actions taken by him which on their face appear to be actions taken pursuant to his authority, but his of-

ficial position does not deprive him of the right to act as an individual in personal altercations with others. However, his official position does not vest in him the power to engage in personal altercations with other citizens. It only vests in him the power to take persons into custody under a claim that such persons have violated some law. So, ladies and gentlemen of the jury, in determining the guilt or innocence of the defendants here, you must take into consideration the circumstances under which the defendants took Sage and Gaither into custody and determine whether or not in so doing and in doing what they did, the action taken by them was taken "under color of State law."

If you find from the evidence in this case that the defendants took Sage and Gaither into custody under color [18] of law by reason of the positions they held, then the court charges you that Sage and Gaither had the right to be tried upon any charge for which they had been arrested, in a regularly constituted court of justice having jurisdiction and if found guilty subjected to the usual pain and penalties applicable to all persons alike for the offense charged, but not to be subjected to unusual punishment or to be tried by ordeal by the defendants. Those were their constitutional rights and privileges under the Federal Constitution.

Let me repeat the essential issue on this question. As previously stated to you, the Federal Statute under which the defendants are here on trial has no

application to a citizen who acts without color of law; that is, of his own personal volition for his own personal reasons. The act applies only when and only to one who acts under the guise or pretense of authority of law and the statute was not designed to reach private personal controversies between two people. So if you find from the evidence that the defendants were not acting under color of law, but solely in their individual capacities, because of personal animosity toward Sage and Gaither, then what they did constituted only a violation of the State law, which should be remedied in the State courts of Nevada, and is not a violation of any Federal law. But, as I said before, if Sage and Gaither were taken into custody by the defendants, under color of law, by reason of the positions held by the defendants, then the ordeal to which the defendant, Pool, subjected both Sage and Gaither and the ordeal to which the defendant, Clifton, subjected Sage at a point near Nellis Air Force Base constituted a violation of the Federal [19] statute.

Your attention is further specifically called to the language of the statute which provides that "whoever, under color of law," etc., does the act prohibited, shall be guilty of the offense defined in the statute. Now color of law means a mere semblance of legal right. So, color of law, as used in the statute, does not necessarily mean the exercise of some specific legal authority vested in an officer of the law, but also semblance, appearance and

pretense and implies, in the language of the statute, that the act to which it applies need not necessarily have the real characteristics of a legal act. Therefore, we do not have in this case any question as to whether the defendants, in taking Sage and Gaither into custody, acted under authority of any law of Nevada, but whether or not the taking of Sage and Gaither into custody was done under color of law of Nevada, state, county or municipal, arising out of the official positions held by the defendants.

Next, the court calls to your attention the fact that the statute under which the first and second counts are based says, "whoever, under color of any law, statute, ordinance, regulation or custom, wilfully subjects or causes to be subjected any individual to the deprivation of any rights, privileges or immunities secured or protected to him by the Constitution of the United States and the laws of the United States, shall be guilty, etc." The word "wilfully" appearing in this statute, has a meaning and a very distinct and definite meaning that must be carefully considered by you. The statute provides that the thing done must be done wilfully. In law the use of the words, "wilful" and "wilfully" implies a conscious purpose to do wrong. Doing a thing knowingly and wilfully implies not only a knowledge of the thing done, but a determination to do it with bad intent or with an evil purpose or motive. [20] It is not sufficient that the defendants here had generally a bad purpose in doing the things they did. In order to convict Defendants Pool and

Clifton under Count I it is necessary for the jury to find that the defendants had in mind the specific purpose of depriving Sage of a Constitutional right—that is to deprive him of the right to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed; and in order to convict Pool under Count II it is necessary for the jury to find that the defendant had in mind the specific purpose of depriving Gaither of a Constitutional right, that is, to deprive him of the right to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed.

The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees.

The law denies to anyone acting under color of law, statute, ordinance, regulation or custom the right to try a person by ordeal; that is, for he, himself, to inflict such punishment upon the person as he thinks the person should receive. Now in determining whether this requisite of wilful intent was present in this case you, ladies and gentlemen of the jury, are entitled to consider all the attendant circumstances; the malice, if any, of the defendants

toward the subjects, Sage and Gaither; [21] the weapons used in the assaults, if you find any were used; and the character and duration of the provocation of the alleged assaults, and the time and manner in which they were allegedly carried out. All these facts and circumstances may be taken into consideration from the evidence that has been submitted for the purpose of determining whether the acts of the defendants were wilful and for the deliberate and wilful purpose of depriving Sage and Gaither of their Constitutional rights to be tried by a jury just like everyone else.

The use of the word, "wilfully," in the statute, makes "intent" a material element of the offenses charged in this case. Now, "intent" is something that exists in a man's mind. It is impossible for you to enter into the mind of a defendant to determine the intent with which he acted. Therefore, his intent has to be judged at least by his intelligence, as shown by the evidence; by his experience in life, as shown by the evidence, and generally by judging him as reasonably prudent persons, experienced in the affairs of everyday life, judge each other, and it is the law that a person intends the usual consequences of his acts.

The proof of a general intent to do Sage and Gaither wrong is not sufficient, but a specific intent to deprive them of a Constitutional right is a burden the law casts upon the Government in this case. In considering whether the defendants had such specific intent you may take into consideration what defend-

ants Pool and Clifton did on the day when Sage and Gaither were taken into custody.

Neither color of law nor specific intent may be presumed by you ladies and gentlemen of the jury but both color of law and specific intent must be proven by the [22] government beyond a reasonable doubt.

If you find the acts alleged in the indictment to have been committed, then let me summarize the questions you have to determine:

As to Count I:

(1) Did defendants Pool and Clifton take Sage into custody under color of law?

(2) Did defendants Pool and Clifton specifically intend to deprive Sage of a constitutional right guaranteed to him by the United States Constitution?

(3) Has the government established these two foregoing essentials to your satisfaction beyond a reasonable doubt?

If the government has done so it is your duty to find the defendants guilty in this case. If you have a reasonable doubt upon either of the two essentials, it is your duty to acquit the defendants.

As to Count II:

(1) Did defendant Pool take Gaither into custody under color of law? and

(2) Did defendant Pool specifically intend to deprive Gaither of the constitutional right guaranteed to him by the United States Constitution?

(3) Has the government established these two foregoing essentials to your satisfaction beyond a reasonable doubt?

If the government has done so it is your duty to find the defendant guilty in this case. If you have a reasonable doubt upon either of the two essentials, it is your duty to acquit the defendant. [23]

The local newspapers have published accounts of this trial as it progressed, which, of course, was their right to do. However, if any of you have read any such account you are instructed to entirely disregard the same in arriving at your verdict in this case. In this connection you are instructed that you are to determine the guilt or innocence of the defendants in this case solely upon the evidence presented to you in this courtroom. [24]

Now, ladies and gentlemen of the jury, you have heard and patiently listened to the evidence in this case. You are the sole judges of the evidence, its weight and sufficiency and the credibility of the witnesses. It is your duty to seek to reconcile the testimony of the witnesses so as to make each witness speak the truth; but if, after a full and fair consideration of all the testimony, you find an irreconcilable conflict in the testimony then you must determine what testimony is true and reject such testimony you disbelieve and from the testimony you do believe, find your verdict.

In passing upon the credibility of a witness it is proper to take into consideration the manner of the witness on the witness stand, his candor or want of candor, his intelligence or otherwise, the reasonableness or unreasonableness of his statements, his interest, if any he has, and all circumstances surrounding such witness at the time of giving his testimony and at the time of the happening of the events testified about. You are the sole and exclusive judges of the evidence and the credibility of the witnesses, and as to what has been proven and what has not been proven in this case.

In considering this testimony you are to lay aside any preconceived ideas that you may have as to the wisdom or unwisdom of the particular statute under which these defendants are being tried. You and I are under the sworn obligation to enforce the law as it is given to us by Congress and it is not within our province to pass judgment upon the question of whether any particular statute is good or bad, with the consequences of your verdict you have absolutely nothing to do. As to what may be the result of your verdict is entirely beyond your province. All that you are [25] empaneled and sworn to do is to find a verdict that speaks the truth.

If, after considering all the evidence in this case, you believe from the testimony submitted to the exclusion of and beyond a reasonable doubt that the defendants, William Cecil Pool and Edward Ellis Clifton, are guilty as charged in the indictment, then you should find the defendants guilty. On

the other hand, if you have a reasonable doubt as to the guilt of the defendants, William Cecil Pool and Edward Ellis Clifton, you should find them not guilty.

Upon retiring to the jury room, you will select one of your number to act as foreman, or forelady. The foreman or forelady will preside over your deliberations and be your spokesman in court.

Forms of verdict have been prepared for your convenience.

(Forms of verdict read.)

You will take these forms to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman or forelady fill in, date and sign the form to state the verdict upon which you agree as to each defendant, and then return with your verdict to the courtroom.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the Marshal. But bear in mind you are not to reveal to the Court or any person how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached an unanimous verdict.

Dated: October 17th, 1957.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed October 17, 1957. [26]

[Title of District Court and Cause.]

COMMENTS MADE OUTSIDE THE
PRESENCE OF THE JURY

October 17, 1957

The Court takes this opportunity to make this comment outside the presence of the jury. The integrity of our courts is a matter of concern to every citizen, and it is especially the duty of judges to maintain the integrity of the courts. The administration of law is not an exact science but is the product of the customs, traditions and laws of the land. During the course of every trial incidents occur which surprise both court and counsel. The law provides in every instance the procedure to be followed if it is thought by either court or counsel that such incidents have interfered with or obstructed justice. The court and counsel are ever solicitous of the rights of defendants in criminal matters.

Yesterday afternoon, after court had recessed, counsel for the government and counsel for the respective defendants came into chambers and advised the Court of an incident which had been reported to them. It appears that as one of the defense witnesses was about to enter the courtroom to testify, one of government witnesses made some brief comment to that witness.

At this informal discussion between court and counsel concerning such incident, and based upon the alleged comment made, it was agreed by all of

counsel that the incident was entirely harmless, and that the testimony of the witness approached was in no manner influenced thereby. On the basis of the discussion this Court was of the same opinion.

This incident has been reported in the local papers, and, no doubt, been widely read. To lay persons it may appear that some sinister motive is involved, that justice is somehow [11] being thwarted, and the integrity of the Court impeached.

Let me point out that both the government and each of the defendants is represented by able counsel. They are here to serve the interest of their respective clients. They know the law and legal procedure and are competent to protect their respective clients. This they may now do by addressing any motion to the Court.

[Endorsed]: Filed October 18, 1957. [12]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

On this day the defendants above named, William Cecil Pool and Edward Ellis Clifton, appeared in chambers in propria personam and orally moved the Court for an extension of time in which to file their respective motions for a new trial as specified in Rule 33, Federal Rules of Criminal Procedure.

There was present the Clerk of this Court and Franklin P. Rittenhouse, United States Attorney; and it appearing from the statements made by the defendant, William Cecil Pool, that neither of two counsel who represented him during the trial of the matter, which terminated in a verdict of guilty against each defendant, were present within the city of Las Vegas, Carlos G. Watson having returned to the State of Texas following the termination of the trial by the return of the verdict of guilty on October 17, 1957, and Calvin Magleby, associate counsel, being also presently out of the city of Las Vegas; and it appearing that as to the defendant, Edward Ellis Clifton, a misunderstanding has arisen between himself and counsel as to the filing of a motion for new trial; and it further appearing that this is the last day upon [28] which defendants can make and file their motions for a new trial under the situations contemplated in the last sentence of said Rule 33; and it appearing in the interest of justice that the defendants were and are entitled to further time in which to make their respective motions under Rule 33 and particularly under the last sentence of said Rule 33; now therefore, and good cause appearing, it is

Ordered, that the defendants above named, and each of them, are hereby granted to and including the 29th day of October, 1957, in which to make their motions for a new trial, and the five day period specified in the last sentence of said Rule 33 is extended to said 29th day of October, 1957.

Dated at Las Vegas, Nevada, this 22nd day of October, 1957.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed October 22, 1957. [29]

[Title of District Court and Cause.]

AFFIDAVITS OF CHARLES L. MARTIN,
WILLIAM R. HENDERSON, RAMONA
WOLF AND VICTOR L. CARLSON IN OP-
POSITION TO DEFENDANT WILLIAM
CECIL POOL'S MOTION FOR NEW
TRIAL

Comes Now the plaintiff, United States of America, and files in the above-entitled matter, affidavits of Charles L. Martin, William R. Henderson, Ramona Wolf and Victor L. Carlson, hereto attached, in opposition to Defendant William Cecil Pool's Motion for New Trial.

FRANKLIN RITTENHOUSE,
United States Attorney.

By /s/ HOWARD W. BABCOCK,
Assistant United States Attorney, Attorneys for
Plaintiff, United States of America. [35]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
District of Nevada—ss.

Charles L. Martin, being first duly sworn, deposes and says:

That I reside at 600 South Fourth Street, Las Vegas, Nevada; that I was a juror in the above-entitled case and was thereafter selected as foreman of said jury.

That on October 17, 1957, shortly after the jury was discharged by the Court, I was leaving the Federal Court Building by proceeding down the staircase. As I approached the staircase I observed Herman M. Greenspun, defendant William Cecil Pool and his attorney at the head of the stairway. I heard Herman M. Greenspun excuse himself from the persons aforesaid, and said Greenspun then engaged me in conversation as I proceeded down the stairway. We went out of the building and had a conversation on the outside steps of the Post Office Building covering a period of two to three minutes.

H. M. Greenspun said he wanted to know what happened to enable the jury to reach a verdict as fast as it did. [36] He also mentioned he didn't hear the proceedings because he expected to be called as a character witness for defendant Pool.

I replied to the effect that anything I said would be off the record, that is to say, that I was not

speaking for the jury, nor was anything to be a matter of news publication. H. M. Greenspun replied by saying, "all right, the trial is over, you can say what you feel like saying."

I told him in effect "that with the evidence presented to the jury, we had no choice but to render the verdict we did. There was no argument in the juryroom whatsoever, and that had the same evidence been presented against my own brother I would have to vote as I did."

H. M. Greenspun then inquired "if Pool's attorney had let him down." I replied "that I knew nothing about that; that all we (jury) went on was the evidence presented to us and the instructions of the Judge."

I have read the affidavit of H. M. Greenspun filed October 29, 1957. With positiveness, I swear and affirm that I did not make the remark as stated by him that "These cops who disregard the rights of others and use brutality have to be taught a lesson."

While it is true that my son was arrested in Arizona as referred to in H. M. Greenspun's affidavit, I have searched my mind and do not recall the subject of my son's arrest being mentioned in the course of our brief conversation. Again, with positiveness, I swear and affirm that I did not say to him that this was in my mind at the time of our deliberations.

I further assert that at no time during the trial and deliberations was I prejudiced for or against defendants Pool [37] and Clifton.

I say nothing further, except that this affidavit is made and presented to this Court in response and answer to the affidavit made and filed by Herman M. Greenspun.

/s/ CHARLES L. MARTIN.

Subscribed and sworn to before me this 7th day of November, 1957.

[Seal] OLIVER F. PRATT,
Clerk;

By /s/ FRANCES PETTINGIEL,
Deputy. [38]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
District of Nevada—ss.

William R. Henderson, being first duly sworn, deposes and says:

I reside at 229 East Circle Drive, Las Vegas, Nevada; I am the owner and operator of Bill's Cafe, 4231 North Main Street (Salt Lake Highway 91), Clark County, Nevada.

On October 18 and 19, 1957, from 6:30 p.m. to approximately 4:00 a.m., I was working at my cafe aforesaid and was on the premises continuously during that period of time.

About 7:30 p.m., October 18, 1957, Ray Lewis Sage, Jr., and Donald K. Clopton (a former airman now residing in the State of Florida) came into my cafe together. They both ordered a glass of 10 oz. draft beer, and shortly thereafter Sage ordered a sandwich.

About 8:00 p.m., October 18, 1957, Al Ferguson and Donald Miller (an airman on duty at Nellis Air Force Base) came into the cafe. Ferguson took a seat at the bar next to Sage. Miller sat to the left of Ferguson and Clopton on the right of Sage. [39]

I was behind the bar serving the above-mentioned persons and other guests. I was within hearing distance of Sage, Ferguson, Miller and Clopton and heard their entire conversation.

Ferguson offered Sage a drink, which Sage refused. Ferguson then asked Sage "if he needed anything to sleep these nights." Sage answered, "No, nothing's bothering me." Miller and Ferguson engaged in a general conversation and on occasion talked to me. Ferguson then turned to Sage and said, "Say, Sage, tell me something on the level. I want to hear the truth. Did Pool actually beat you or was it Clifton or the other fellow? Ray Sage answered, "All of them were mixed up in it, but Pool didn't beat me so much as the other fellows. He (Pool) was the one that kicked me after the other fellows had worked me over."

At about that time Ferguson got off his bar stool and said, "Hell, let's have another drink." He kept looking at Sage all the time but never said another

word to him. Sage did not have another beer at that time. I was kidding Sage about not having a free drink and Ferguson then said, "He'd better lay off that stuff; he'll be seeing pink elephants and other things next." Shortly after that remark, Ferguson and Miller left the premises after being there about one (1) hour.

Sage and Clopton were on the premises two (2) to three (3) hours. During that period of time Sage had no more than four (4) beers and a sandwich.

I have read the affidavit of Donald Miller, filed October 29, 1957. I swear and affirm that at no time during the course of the conversation of the persons named above did Ray Sage, Jr., say "that William C. Pool did not beat him (Sage) and that Edward E. Clifton and Victor L. Carlson [40] were the ones that administered the beating," nor "that William C. Pool was not even present at the time the beatings were administered."

I say nothing further, except that this affidavit is made and presented to this Court in response and answer to the affidavit made and filed by Donald I. Miller.

/s/ WILLIAM R. HENDERSON.

Subscribed and sworn to before me this 13th day of November, 1957.

[Seal]

OLIVER F. PRATT,
Clerk;

By /s/ FRANCES PETTINGIEL,
Deputy. [41]

[Title of District Court and Cause.]

AFFIDAVIT

State of Minnesota,
County of Becker—ss.

Ramona Wolf, being first duly sworn, deposes and says:

I reside at 214 West Holmes, Detroit Lakes, Minnesota. I was a witness, called by the plaintiff, in the trial of the above-entitled case.

As a witness excluded from the courtroom I was in and about the corridor just outside the courtroom. On the first day of the trial, October 14, 1957, I had occasion to sit next to and have a conversation with Victor L. Carlson. I also spoke to him on occasion during the course of the first day of trial.

Our conversation, for the most part, was an exchange of courteous pleasantries such as our respective employments, the cold weather in Minnesota, my baby, et cetera. Concerning the matter of this case, Mr. Carlson said in effect, "I'm going to give the truth right straight down the line, and Bill knows it's the truth." He also remarked in effect [42] that "it's a good thing, Ramona, you left when you did. It was almost unbearable to live in North Las Vegas. Can you imagine that he even picked me up for violation of the Rooming House Ordinance, and Evelyn and I have been married for some time."

At no time did Victor L. Carlson say to me that "he was not testifying to the truth" or that "he

testified in the manner he did for the reason he was going to get revenge against William C. Pool," or that "he was going to get even with him."

Victor L. Carlson also said to me on that day something to the effect that "I know I was wrong. I have a conscience. I was there when these boys were beaten. I couldn't sleep nights. The only way I could clear my conscience was to talk to someone and tell the truth."

In my own mind I know that Mr. Carlson did not try to get revenge.

Also during the course of the trial Defendant William Pool and I had a conversation about the baby and our own personal affairs. During that conversation William Pool asked me, "Is Vic trying to get revenge?"

I answered him as follows: "No, Bill, he is not; he wants to tell the truth to clear his own conscience."

I say nothing further, except that this affidavit is made and presented to this Court in response and answer to the affidavit made and filed by Margaret Simpson.

/s/ RAMONA WOLF.

Subscribed and sworn to before me this 11th day of November, 1957.

[Seal] /s/ [Indistinguishable.]

Notary Public in and for the County of Becker,
State of Minnesota.

My commission expires March 9th, 1962. [43]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
District of Nevada—ss.

Victor L. Carlson, being first duly sworn, deposes and says:

I reside in North Las Vegas, Nevada. I was a witness, called by the plaintiff, in the trial of the above-entitled case.

On the first day of the trial, October 14, 1957, I had occasion to be seated next to Ramona Wolf in the corridor just outside the courtroom. At that time and on brief occasions during that day we engaged in conversation.

As recited in the affidavit of Ramona Wolf our conversation, for the most part, was an exchange of courteous pleasantries. I do recall telling her that I was going to testify to the truth straight down the line. I also mentioned to her that my conscience had bothered me, that I couldn't sleep nights because of the whole affair, and that the only way I could clear my conscience was to tell the truth. I also told her about my arrest in North Las Vegas for an alleged violation of the Rooming House Ordinance.

I have read the affidavit of Margaret Simpson, a person unknown to me. At no time did I say to Ramona Wolf [44] nor to anyone that I testified in the manner I did for the reason that I was going to

wilfully subjects one to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

4. Concise Statement of Judgment or Order Giving Date and Any Sentence:

The judgment was entered on October 17, 1957, after a jury verdict of guilty. The Court imposed sentence on November 1, 1957, for a period of one year.

On October 22, 1957, the District Court entered an order extending until October 29, 1957, the time for appellant to file a motion for new trial. On October 29, 1957, appellant filed a motion for new trial. On November 18, 1957, the District Court entered an order denying the motion for new [71] trial.

5. Name of institution where appellant is now confined if not on bail:

I, the above-named appellant hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment and the order denying a motion for the new trial.

Dated: November 18, 1957.

/s/ MORTON GALANE,
Attorney for Appellant.

[Endorsed]: Filed November 18, 1957. [72]

In the United States District Court,
for the District of Nevada

No. Cr. 136

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM CECIL POOL and EDWARD ELLIS
CLIFTON,

Defendants.

Before: Hon. John R. Ross, Judge.

JURY TRIAL

Be It Remembered, that the above-entitled matter came on for trial before the Court, sitting with a jury, at Las Vegas, Nevada, on Monday, the 14th of October, 1947, at the hour of ten o'clock a.m.

Appearances:

FRANKLIN P. RITTENHOUSE, ESQ.,
HOWARD W. BABCOCK, ESQ.,

Attorneys for Plaintiff.

CARLOS G. WATSON, ESQ., and
CALVIN C. MAGLEBY, ESQ.,

Attorneys for Defendant Pool.

M. G. MATTEUCCI, ESQ.,

Attorney for Defendant Clifton.

The following proceedings were had:

ROBERT M. NELSON

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name?

A. Robert M. Nelson. [1]

Q. You have previously been sworn, have you not?

A. Yes, sir.

Q. Where do you reside?

A. 2101 College, North Las Vegas.

Q. What is your occupation?

A. City Clerk, City of North Las Vegas.

Q. How long have you held that position?

A. Three years.

Q. Did you bring with you, pursuant to a subpoena duces tecum served upon you, certain records of the City of North Las Vegas, relating to the appointment of William Cecil Pool to office in that city?

A. Yes, sir.

Q. Do you have that record with you?

A. Yes, sir; at a special meeting.

Q. Just one moment. What record did you bring?

A. These are the minutes.

Q. Minutes of what?

A. Council meeting.

Q. Of the City of North Las Vegas?

A. Yes.

Q. Were you charged with the custody of that particular minute book which you have before you?

A. Yes, sir.

(Testimony of Robert M. Nelson.)

Q. As city clerk of that city, is that correct? [2*]

A. That is right.

Q. Do your minutes reflect an appointment of William Cecil Pool to an office in the North Las Vegas Police Department? A. They do.

Q. Can you identify the page number of the exhibit?

A. The page number of the minute book is 417.

Q. Is it possible that those pages can be removed for return, or is that a permanently bound volume? A. They can be taken out.

Q. Would you please remove those two pages?

A. Yes, sir.

Q. Mr. Nelson, I hand you plaintiff's Exhibit No. 1 for identification and I will ask you to identify this proposed exhibit.

A. This is two pages, pages 416 and 417, from the minute book No. 1 of the City of North Las Vegas, Nevada, which accounts for the special meeting of the city council, in which a chief of police was appointed to that position.

Q. And this is an official document of the City of North Las Vegas? A. It is.

The Court: What was the date of that meeting, counsel?

Mr. Babcock: August 29, 1955. I offer into evidence, your Honor, the exhibit as identified, plaintiff's No. 1 for identification.

Mr. Watson: No objection on behalf of defendant Pool.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Robert M. Nelson.)

Mr. Matteucci: No objection. [3]

The Court: There being no objections by counsel for the two defendants, the exhibit is received in evidence as government's No. 1.

Q. Handing you Plaintiff's Exhibit No. 1, Mr. Nelson, will you state what was had by way of minutes of regular meeting September 6, 1955, by the City of North Las Vegas?

A. Did you say referring to September 6th?

Q. Referring to the exhibit just handed you, what was accomplished at that special meeting?

A. The City Council appointed William C. Pool chief of Police. The motion of the council was made by Councilman Ferguson that William C. Pool be appointed and Councilman Evans seconded the motion. The motion carried.

Q. What was the date of that meeting?

A. The date of that meeting, sir, August 29, 1955.

Q. Do you have with you, Mr. Nelson, any official records of the City of North Las Vegas, relating to the termination of the employment of Mr. Pool as chief of police of that city?

A. Yes, I do. I have a record of the termination in the minute book No. 2, pages 13 and 14.

Q. Would you remove that page, Mr. Nelson, please. Mr. Nelson, I hand you Plaintiff's Exhibit No. 2, consisting of two separate sheets, bearing numbers 13, 14, 15 and 16, and ask you if you can identify this proposed exhibit?

A. Yes, sir, I can. [4]

(Testimony of Robert M. Nelson.)

Q. What is it?

A. These are pages from the minutes of minute book No. 2, covering the minutes of regular council meeting held September 4, 1956.

Q. Is that an official document of the City of North Las Vegas? A. That is right.

Q. And maintained by you as city clerk of that city? A. Yes, sir.

Q. And in your custody? A. Yes, sir.

Mr. Babcock: I offer into evidence Plaintiff's Exhibit 2 for identification.

Mr. Watson: If the Court please, do I understand counsel is now offering this exhibit for admission?

Mr. Babcock: Yes.

Mr. Watson: I object to the acceptance of this exhibit because it is apparently offered merely to prove the time in question at all times pertaining to this case Mr. Pool was chief of police of the City of North Las Vegas, Nevada, which we will be glad to stipulate. However, the matter here contained goes far beyond that and goes into a number of facts which might tend unfairly to prejudice this defendant, Mr. Pool, and which have no independent relevancy to the issues in this case.

The Court: You say counsel, you will stipulate this [5] defendant, Pool, at all times relating to material, to the charges contained in the indictment on file herein, was a regular and duly appointed and acting police officer of the City of North Las Vegas?

Mr. Watson: Yes, your Honor.

(Testimony of Robert M. Nelson.)

Mr. Babcock: I will accept the stipulation, your Honor. I think for the record, however——

The Court: Of course the Court can't pass upon the objection made by counsel to Exhibit 2 for identification until the Court has looked at it. If there is some objectionable matter in there, it certainly should not be permitted to be introduced.

Mr. Babcock: In view of the proposed stipulation, I will withdraw the offer, offer it so it may show the actual date of termination.

The Court: Get together and stipulate that.

Mr. Watson: Whatever the actual date of termination I will be glad to stipulate. I believe it is September 4, 1956.

The Court: Let the record show it is stipulated between counsel that as of September 4, 1956, the official position of the Defendant Pool as acting North Las Vegas police officer was terminated by the City of North Las Vegas. Your offer to [6] introduce into Exhibit 2 is withdrawn?

Mr. Babcock: Yes, your Honor, with the understanding that the stipulation recited by your Honor that the amendment can be made a matter of record.

Q. Mr. Nelson, did you bring with you any official records which reflect the employment of Edward Ellis Clifton with the City of North Las Vegas? A. Yes, sir.

Q. Mr. Nelson, I hand you Plaintiff's Exhibit 3 for identification and ask you to identify the proposed exhibit.

(Testimony of Robert M. Nelson.)

A. This is an oath of office which was sworn to before me by Edward Ellis Clifton when he became a member of the Police Department of the City of North Las Vegas. It is signed by Edward Clifton, subscribed and sworn to before me the 27th day of October, 1955.

Q. Is that an official record of the City of North Las Vegas? A. Yes.

Q. Where is that record maintained?

A. At the North Las Vegas city hall.

Q. And you have custody of that record, together with other official records of the City of North Las Vegas, is that right? A. Yes, sir.

Mr. Babcock: I offer into evidence, your Honor, Plaintiff's Exhibit 3 for identification.

The Court: Any objection? [7]

Mr. Matteucci: No objection, your Honor.

The Court: There being no objections, the offer is received in evidence as Plaintiff's Exhibit 3, being oath of office of the Defendant Clifton as an officer of the City of North Las Vegas.

Q. I hand you plaintiff's Exhibit 4 for identification, Mr. Nelson, and ask if you can identify that document?

A. This is a payroll record of Edward Ellis Clifton, police officer. It shows the date he terminated, 1956; it does not show the exact date, but approximately between the 1st and 15th of March, 1956. This last entry——

Q. Don't testify from the entry as yet. May I ask if this is an official record, kept in the ordinary

(Testimony of Robert M. Nelson.)

course of business of the affairs of the City of North Las Vegas?

A. Yes.

Q. Where is that record maintained and kept?

A. City hall of North Las Vegas.

Mr. Babcock: We offer into evidence Plaintiff's Exhibit 4 for identification.

Mr. Matteucci: No objection.

The Court: The offer will be received in evidence as Government's Exhibit 4, being official record, payroll record, and the exhibit being offered for the purpose of showing the approximate termination date of the employment of the Defendant Clifton [8] as a police officer of the City of North Las Vegas.

Q. I hand you again Plaintiff's Exhibit 4 in evidence, Mr. Nelson. I will ask you what is the date as recorded in that record of the termination of employment of the Defendant Clifton?

A. The date shown is March 15, 1956, and that is the payroll date.

Q. Mr. Nelson, do you have personal knowledge if Edward Ellis Clifton was an acting police officer with the North Las Vegas Police Department from October 27, 1955, to March 15, 1956?

A. Yes, sir.

Q. And what was his office in the police department, if you know?

A. His position when he terminated was rank of captain, sir. When he was first employed, he was employed as a policeman, when he was first em-

(Testimony of Robert M. Nelson.)

ployed. During that time he was elevated to the rank of captain.

Q. Does the record show continuous employment during the dates referred to? A. Yes, sir.

Mr. Babcock: You may inquire.

Mr. Watson: No questions.

Cross-Examination

By Mr. Matteucci:

Q. Mr. Nelson, do you know, of your own knowledge, when Mr. [9] Clifton became captain of the North Las Vegas police department?

A. May I see that record? Mr. Clifton became captain on January 4, 1956.

Mr. Matteucci: That's all, your Honor.

Witness permanently excused.

Mr. Babcock: In view of the fact these documents offered by the government are official records, the government requests the right to substitute, in lieu of the originals, photostatic copies thereof.

Mr. Watson: No objection.

Mr. Matteucci: No objection.

The Court: So ordered.

ARTHUR DAVIDSON

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name, please?

A. Arthur Davidson.

Q. Where do you reside, Mr. Davidson?

A. 2533 Spear Street, North Las Vegas.

Q. What is your occupation?

A. Police officer, City of North Las Vegas.

Q. In what position at the present time?

A. Lieutenant.

Q. What are your duties? [10]

A. I am in charge of the Detective Bureau.

Q. As such, do you have custody and control of the booking sheet records of the North Las Vegas police department?

A. Yes, sir.

Q. You were requested by subpoena to bring to court the booking sheets for Ray Louis Sage, Jr., and Coit Morton Gaither, Jr. Do you have those booking records with you?

A. I do, sir.

Q. Mr. Davidson, I hand you Plaintiff's Exhibit 5 for identification. I will ask you if you can identify this proposed exhibit?

A. Yes, sir. It is a booking report, booking sheet, of the police filed of North Las Vegas.

Q. Relating to whom?

A. Ray Louis Sage, Jr.

Q. What is the date of that booking sheet?

(Testimony of Arthur Davidson.)

A. 2-27-56, 9:05 p.m.

Q. Is there an official record of the police department of North Las Vegas? A. Yes, sir.

Q. And is that record kept in the ordinary course of the affairs of the North Las Vegas police department? A. Yes, sir.

Mr. Babcock: I offer into evidence Plaintiff's Exhibit 5 for identification. [11]

Mr. Watson: No objection.

Mr. Matteucci: I have no objection.

The Court: There being no objection on the part of counsel for either defendant, the offer is received in evidence as Government's Exhibit 5, being the booking report dated 2-27-56, as relates to the Prisoner Sage.

Q. Mr. Davidson, I hand you Plaintiff's Exhibit 6 for identification and ask you if you can identify that proposed exhibit?

A. I can, sir. This is also a booking report of the police files of the City of North Las Vegas.

Q. An official record maintained in the ordinary course of the business of the police department?

A. Yes.

Q. To whom does this relate?

A. Coite Morton Gaither.

Q. What is the date of the booking?

A. 2-27-56, 4:30 p.m.

Mr. Babcock: I offer into evidence Plaintiff's Exhibit 6 for identification.

Mr. Watson: No objection, your Honor.

Mr. Matteucci: No objection.

(Testimony of Arthur Davidson.)

The Court: There being no objections, the offer is received in evidence as Government's Exhibit 6, being booking report with reference to Coite [12] Morton Gaither, dated 2-27-56.

Q. Showing you next Exhibit 5 in evidence, booking report relating to Sage, I will ask you what the booking report reports as to date and time of his arrest by the North Las Vegas police department?

A. The only date on the book is 2-27-56 at 5 p.m.

Q. And handing you Plaintiff's Exhibit 6 in evidence, booking report of Coite Gaither, I will ask you the date and time of the arrest as reflected on that exhibit.

A. Gaither, 2-27-56 at 4:30 p.m.

Q. And as it relates to Ray Louis Sage, what was the charge at the time of arrest?

A. Charge on Ray Sage was burglary investigation.

Q. And what was the charge as reflected on the booking report of Coite Gaither?

A. Gaither was vagrancy and burglary investigation.

Mr. Babcock: You may inquire.

(Testimony of Arthur Davidson.)

Cross-Examination

By Mr. Watson:

Q. Lieutenant Davidson, did you also bring with you the logs for the activities for North Las Vegas police department on that date, showing radio calls in and out and any other business transacted?

A. I did not. I brought everything except the radio log.

Q. And they are in your charge?

A. Yes, sir. [13]

Q. You did not bring them with you?

A. No, sir.

Mr. Watson: If the Court please, Mr. Pool feels that Lt. Davidson should be subpoenaed on behalf of the Defendant Pool, to appear in court tomorrow with the radio logs, which are part of the official records of the North Las Vegas police department.

Mr. Babcock: I suggest counsel issue the subpoena.

The Court: That is the usual way. There is nothing to prevent your doing that. Your motion is, however, proper. You can issue subpoena, and if you have any other records you desire, designate them properly in the subpoena.

Mr. Watson: Thank you. No further questions.

(Testimony of Arthur Davidson.)

Cross-Examination

By Mr. Matteucci:

Q. Mr. Davidson, I hand you Plaintiff's Exhibit 5 and ask you if you can tell the members of the jury what the court disposition was regarding Ray L. Sage, Jr.

A. The court disposition was one to fifteen years.

Q. I hand you Plaintiff's Exhibit 6 and ask you if you can tell the ladies and gentlemen of the jury what the court disposition was for Coite Gaither?

A. According to this, it was one to fifteen years; merely says one to fifteen years. The report is not dated.

Q. That is in both cases? [14]

A. Both cases.

Mr. Babcock: No further questions.

Witness excused.

RAY L. SAGE, JR.

a witness on behalf of the plaintiff being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name?

A. Ray L. Sage, Jr.

Q. You have been previously sworn?

(Testimony of Ray L. Sage, Jr.)

A. Yes, sir.

Q. Where do you make your home?

A. West Virginia.

Q. What city? A. Marlinton.

Q. On February 27, 1956, where was your permanent residence?

A. Nellis Air Force Base, Las Vegas, Nevada.

Q. As a member of what?

A. Thirty-fifth Airman Training Squad.

Q. Were you an airman with the United States Air Forces at that time? A. Yes, sir.

Q. What was your permanent address, residence address, on February 27, 1956?

A. Same place, Marlinton, West Virginia.

Q. And you are a citizen of what country? [15]

A. United States.

Q. On or about February 27, 1956, Mr. Sage, were you taken into custody by certain personnel of the North Las Vegas police department?

A. Yes, sir.

Q. When were you first taken into custody, what time of day?

A. It was in the morning, around nine o'clock.

Q. Where were you at that time?

A. I was at Grande Court.

Q. Is that a motel lodging? A. Yes, sir.

Q. What happened on that morning?

A. The policeman came in and woke me up in bed.

Q. What policeman do you refer to?

(Testimony of Ray L. Sage, Jr.)

A. Detective Carlson was one and another policeman I don't know.

Q. How were they dressed?

A. Detective Carlson had on civilian clothes and the policeman was dressed in uniform of Las Vegas police department.

Q. What happened after you were awakened?

A. They told me I must go to the police station, so they took me out to the car and took me to the police station and a guy there named Jerry Fritzel, they took him, too.

Q. Jerry Fritzel was in the motel room with you?

A. Yes, sir. [16]

Q. And these police officers took you both at that time, is that a fact?

A. Yes, sir.

Q. Who drove you to the police station?

A. Detective Carlson.

Q. What time did you arrive at the police station?

A. Oh, about fifteen minutes later.

Q. And what happened after you arrived at the police station, at the North Las Vegas police department?

A. I sat there quite awhile.

Q. Where?

A. In the police station, North Las Vegas, and they never asked me any questions for quite awhile.

Q. For quite awhile, how long was that, would you say?

A. I would say about half an hour.

Q. Were you seated alone?

A. Yes, sir.

Q. You had no conversation?

A. No, sir.

Q. Then after that wait, what happened?

(Testimony of Ray L. Sage, Jr.)

A. Then they started to ask me questions about the burglary.

Q. Who started to ask you questions?

A. Pool and Carlson.

Q. Where did this interrogation take place?

A. It was in the same place, North Las Vegas police station. [17]

Q. Do you remember if the room was given a special name? A. Not that I know of.

Q. How long did this interrogation take place?

A. About fifteen minutes.

Q. During that fifteen minutes who was present?

A. Same people, you know, Carlson, Pool and Clifton.

Q. What questions did they ask of you?

A. About the burglary; about people I knew around here.

Q. Did they identify any particular burglary?

A. Yes, sir.

Q. More than one? A. Yes, sir.

Q. What did you say during that period of interrogation?

A. I told them I didn't know what they was talking about.

Q. Then what happened after that fifteen minutes of interrogation?

A. They took me in a room where they had a radio for car calls and I was in there awhile, an hour and a half. While I was sitting in the office they put me in another room, Coite Gaither and I.

Q. Were you placed under arrest at that time?

(Testimony of Ray L. Sage, Jr.)

A. Not that I know of.

Q. What happened in the radio room?

A. I just sat there, waited.

Q. Were you interrogated by any one? [18]

A. No, sir; not in there.

Q. Did you have a conversation with any one at that time?

A. Maybe an officer, that's about all.

Q. How long did you remain in the radio room?

A. I believe about an hour and a half, around an hour.

Q. Were you interrogated by any one during that period of time while in the radio room?

A. No, sir.

Q. Then what next happened?

A. Then they took me out to the car.

Q. Who took you out to the car?

A. I think it was Capt. Clifton, I am not sure.

Q. Whoever it was, did a police officer escort you? A. Yes, sir.

Q. Where was the car parked that you speak of?

A. In front of the North Las Vegas police department.

Q. What kind of car was it? A. Ford.

Q. Did it have any markings on it?

A. No, sir.

Q. How was Captain Clifton dressed at that time when you observed him at the police station on that date? A. I think it was a brown suit.

Q. What did you do, or what was done, when you got out to the car? [19]

(Testimony of Ray L. Sage, Jr.)

A. They asked me if I took a ride with Coite Gaither the morning of the 27th and I said no.

Q. Who asked that, if you remember.

A. Pool.

Q. How was Mr. Pool dressed?

A. He was in a suit, I don't know which color.

Q. Can you identify at this time Mr. Pool?

A. Yes, sir.

Q. Is he in this courtroom? A. Yes, sir.

Q. Would you point him out?

A. That man sitting at the table.

Q. Can you identify at this time Edward Ellis Clifton? A. Yes, sir.

Q. Is he in this courtroom? A. Yes, sir.

Q. Is he seated at the table? A. Yes, sir.

Q. Would you point him out?

A. Sitting there on the right side.

Q. Between counsel? A. Yes, sir.

Q. At the time you had this conversation about the ride with Coite Gaither on the morning of the 27th, were you in the car or outside the car? [20]

A. Inside the car.

Q. Where were you seated?

A. In the back seat.

Q. On what side, if you recall?

A. Left-hand side.

Q. Who else was in the car?

A. Detective Carlson, Chief Pool.

Q. Where was Detective Carlson seated?

A. Seated on the driver's side.

Q. Where was Mr. Pool?

(Testimony of Ray L. Sage, Jr.)

A. Mr. Pool was in the back seat with me.

Q. Was any one else in the car?

A. Clifton.

Q. Where was he seated?

A. He was up in the front seat.

Q. At that time and before you left, if you did in fact leave, did you have a conversation with the three officers you testified about?

A. There was a conversation.

Q. Then what happened?

A. Then he brought Coite Gaither out to the car and they asked him some questions.

Q. In your presence? A. Yes, sir.

Q. Who asked him, if you recall? [21]

A. I can't recall.

Q. One of the three officers? A. Yes.

Q. What was said?

A. They asked Coite Gaither had he taken a ride that morning and he said both of us had taken a ride together and Gaither said, "Yes, don't you remember that guy we took up to the Western Union," and they said that is all they wanted to hear.

Q. Then what happened.

A. Then they backed the car out.

Q. What happened to Gaither?

A. They took him. I never noticed where they took him.

Q. What next happened after Gaither left?

A. They backed the car up and started toward Nellis Air Force Base and told me to get down on the floor boards in the back seat.

(Testimony of Ray L. Sage, Jr.)

Q. When did they tell you to get down on the floor boards?

A. After we pulled out of the police station.

Q. Who told you to do that?

A. Chief Pool.

Q. Then what happened?

A. They took me out towards Nellis Air Force Base and turned off onto a dirt road.

Q. About how far do you believe you travelled on the road going to the Nellis Air Force Base? [22]

The Court: Can you ladies and gentlemen hear? At any time you do not hear properly, just speak up.

Juror: Not too clearly.

(Witness admonished to speak up.)

Q. About how far would you estimate it to be?

A. I can't say exactly. I was just laying there. I know just about how far it is—just laying there, I couldn't tell—about three or four miles.

Q. And during that three or four miles, what was your position in the car?

A. I was still on the floor board.

Q. Were you handcuffed at that time?

A. No, sir.

Q. And then your testimony is that the car turned into a dirt road?

A. Yes, sir.

Q. Then what happened?

A. Then we proceeded by this dirt road and they turned off and I do remember them getting out of the car and talking and they hadn't taken me out of the car yet and they said—I caught a couple of words—they said, "We had better go some place

(Testimony of Ray L. Sage, Jr.)

else," so they got back in the car and went on up this dirt road and they stopped and I got out, side of a small gulley, and as I started to get out, Captain Clifton, he hit me in the mouth with what I thought was his elbow and he proceeded to beat me with [23] his flashlight.

Q. Going back, Mr. Sage, after you turned off onto this road off the highway, how far did you travel, to the best of your approximation?

A. I guess around two or three miles.

Q. And if I understand your testimony correctly, you made a turn and came to a halt?

A. Yes, sir.

Q. How long were you at that particular location? A. I would say about five minutes.

Q. What, if anything, happened at that spot?

A. They got out and they were talking between themselves, off from the car a small piece, and they talked about five minutes and they said they better go some place else.

Q. At the time you said they were talking among themselves, where was the car located, if you know?

A. I don't know. I was still on the floor.

Q. And then after this five-minute stop, you were still in the car and on the floor board, is that correct? A. Yes.

Q. And then you drove to another location, is that correct? A. Yes.

Q. And how far did you drive from that first stop to the second location?

A. I can't say as to that. [24]

(Testimony of Ray L. Sage, Jr.)

Q. A matter of a few minutes?

A. Yes, sir.

Q. Were you on the floor board during that transportation?

A. Yes, sir.

Q. After you arrived at this second location, did you leave the car?

A. Yes.

Q. Who propelled you out of the car, if any one?

A. Captain Clifton.

Q. Do you recall what he said?

A. No, sir.

Q. And then where did you go after you got out of the car?

A. No place. They started beating me.

Q. Where were you at the time they started beating you?

A. I was side of the gulley.

Q. That is what I am asking, how far from the car was this gulley? About how far did you have to walk?

A. I would say about twenty feet, thirty.

Q. And after you came to the gulley, who was present with you?

A. I never went to the gulley yet. I was getting a beating when I got out of the car. I didn't get out and walk to the gulley.

Q. Where were you at the time you first were being beaten?

A. Beside the car. [25]

Q. Do you recall on what side?

A. The right-hand side of the car.

Q. What happened? Who struck you, if any one?

A. Captain Clifton struck me first.

Q. Did you see what he struck you with?

(Testimony of Ray L. Sage, Jr.)

A. I thought it was his elbow or fist, I wasn't looking at him.

Q. Then what next happened?

A. Then he started beating me with the back of his flashlight.

Q. Who did that?

A. Captain Clifton. He held the flashlight.

Q. While you were still against the car?

A. No, sir; I was not.

Q. Where were you then?

A. I was a couple of feet away from the car.

Q. Did any one else but Captain Clifton beat you with the flashlight? A. No, sir.

Q. How big a flashlight was it?

A. Pretty good size, the way I looked at it.

Q. Did you observe what kind of a flashlight, what it had on it?

A. I couldn't say exactly. I know it was a silver handle, had silver on it and the head was black on it. I never saw him when he hit me. [26]

Q. Where were you hit with the flashlight?

A. In the chest, abdomen.

Q. How many times, if you know?

A. I don't know how many times.

Q. Can you give us an approximation?

A. I would say around twenty-five or a hundred.

Q. What effect did this have upon you physically?

Q. Well, I kept falling on the ground every time he did it.

(Testimony of Ray L. Sage, Jr.)

Q. How many times, while being administered with this flashlight, did you fall to the ground?

A. I couldn't say.

Q. Can you give an approximation?

A. No, sir; approximately twenty times.

Q. How would you get up off the ground?

A. I just picked myself up off the ground.

Q. After you were administered the beating by the flashlight, what next happened?

A. Then they took me down to this gulley to a couch.

Q. Who took you down to the gulley?

A. Chief Pool.

Q. Alone?

A. Mr. Carlson, he was standing there. He was in the car seat. I got in this gulley——

Q. How far was this from the police car?

A. About thirty or forty feet. [27]

Q. Who escorted you down this gulley?

A. Chief Pool.

Q. What was done and said there?

A. He asked me if I was ready to tell him all that happened and I told him I didn't know a thing that happened, didn't know nothing about it.

Q. Nothing about what?

A. About the burglary.

Q. What burglary was that, do you recall?

A. Valley Market, Foodland Market.

Q. When Captain Clifton was using the flashlight on you, was there any conversation between you and Clifton?

(Testimony of Ray L. Sage, Jr.)

A. I didn't say nothing, no.

Q. What was Captain Clifton doing at that time?

A. At the time I was in the gulley?

Q. No; when he was using the flashlight.

A. He was beating me at that time.

Q. Was he saying anything to you?

A. "Are you ready to talk?" That is about the only thing he said.

Q. How often did he say that?

A. I don't know.

Q. When he asked you, "Are you ready to talk," what did he mean, did you know?

A. It was about the burglary. [28]

Q. Do you recall if Officer Carlson or Pool had any conversation at the time Clifton was hitting you with the flashlight?

A. No, sir; I can't.

Q. Then you were escorted down in the gulley to a couch with Officer Pool?

A. I think it was a car seat.

Q. Was it an abandoned car seat, is that it?

A. It didn't have a back on it.

Q. What happened when you got down to the car seat?

A. Chief Pool asked me if I was ready to tell him the truth and I told him no, I didn't know nothing about it, and then Captain Clifton, he ran down on the bank with a pistol in his hand and he said, "I am getting tired of this," and stuck it to my temple and he said, "You had better talk."

Q. Did you see the gun?

(Testimony of Ray L. Sage, Jr.)

A. Yes, sir; I saw the gun.

Q. Then what happened?

A. I told him that I didn't know nothing about it and so they took me back up to the car and put me back on the floor board of the back seat and handcuffed me, so they started to drive back to town.

Q. How long were you in the gulley?

A. I couldn't say, about fifteen or twenty minutes, I guess.

Q. And during that period of time did any one strike you? A. No, sir. [29]

Q. During this period of time that you were being taken from the police department to this gulley and back again, did Officer Pool physically assault you? A. Yes, sir.

Q. When was that?

A. That was at the time I was getting beat by Captain Clifton.

Q. What did Officer Pool do at that time?

A. Well, he used his feet when I went down there, he kicked me on the chest.

Q. How many times did that happen, if you recall?

A. It wasn't too many times. I wouldn't say over three or four times at the most.

Q. Was there any other time during this ride that Officer Pool physically assaulted you?

A. No, sir.

Q. After you had left the gulley, what did you do?

(Testimony of Ray L. Sage, Jr.)

A. They put me back on the floor boards of the back seat and handcuffed my hands.

Q. When were your hands handcuffed?

A. They were handcuffed during the beating.

Q. What beating?

A. When Captain Clifton was beating me with the flashlight.

Q. How were you handcuffed?

A. My hands behind me, my wrists.

Q. Who handcuffed you? [30]

A. I can't recall.

Q. One of the three officers?

A. Yes, sir.

Q. And were you handcuffed prior to the time Captain Clifton beat you with a flashlight?

A. No, sir.

Q. When were you handcuffed?

A. I was handcuffed about the middle of the beating.

Q. When you were handcuffed did you fall to the ground at any time during the beating?

A. Yes, sir.

Q. How were you able to get up?

A. Best way I could.

Q. How many blows were struck you while you were handcuffed with your hands behind you?

A. I couldn't tell.

Q. About how many?

A. Approximately, I would say, around thirty times; I am not sure.

Q. You said that Officer Pool kicked you where?

A. In my chest.

(Testimony of Ray L. Sage, Jr.)

Q. Some three or four times, is that your testimony? A. Yes, sir.

Q. Did he ever do this while you were on the ground?

A. No, sir; not that I could see. [31]

Q. Did any one kick at you while you were on the ground, that you know or recall?

A. Well, I recall Captain Clifton jumping on top of me.

Q. How? A. With his feet.

Q. Kicking you?

A. No, sir; I wouldn't say kicking me. I would just say stamping.

Q. Do you recall what part of your body?

A. Around the kidneys, around the lower part of my body and also on my stomach.

Q. After you came up from the gulley, you were returned to the car, is that correct? A. Yes.

Q. May I ask, Mr. Sage, if you resisted any of the three officers from the time you left the police department to the time you were returned to the car from the gulley? A. No, sir; not one.

Q. Did you attempt to escape?

A. No, sir.

Q. Did you attempt to fight? A. No, sir.

Q. Did you have any argument with any of the officers?

A. No, sir. The only argument I had——

Mr. Matteucci: Objected to as self-serving statement. [32]

The Court: You may explain the answer. Ob-

(Testimony of Ray L. Sage, Jr.)

jection overruled. The question was, did you have an argument? The witness said no and said "the only argument I had" and was going to say something. I assume, counsel, you are referring to argument during this particular time?

Q. Yes, anything that was in the nature of an argument?

A. If you consider it an argument—they kept asking me if I was ready to tell the truth and I kept saying no, I didn't know nothing about it. That was all that was said.

The Court: When you answered "no," that is an indication that you wouldn't tell the truth, or that you didn't know anything about the situation. How about asking that question?

Q. You testified, as I understand, your only answer to the conversation was to the effect that you had no further information, is that right? They asked you if you wanted to talk?

A. Yes, sir; they asked me if I wanted to talk and I said, "No, sir; I never did nothing." That is all the argument.

Q. After you were then escorted back to the car from the gulley, how were you placed in the car?

A. On my back.

Q. Were you handcuffed at that time?

A. Yes, sir.

Q. And where was Officer Pool seated? [33]

A. He was seated in the back seat.

Q. Where was Officer Clifton seated?

(Testimony of Ray L. Sage, Jr.)

A. Officer Clifton was in the back seat—Pool, he was out in front.

Q. And Carlson, where was he seated?

A. He was driving.

Q. Then what happened after you got into the back seat of the car?

A. At the time I guess they went back to town and Captain Clifton, he still had the flashlight while I was lying down on my back, he punched my abdomen with the flashlight.

Q. Who did that? A. Captain Clifton.

Q. About how many times?

A. I don't know.

Q. Then where were you driven, if you know?

A. I was driven to North Las Vegas police station, behind it.

Q. Behind it? A. Yes, sir.

Q. When you returned to the rear of the police station, were you on your back at all times during that transportation? A. No, sir.

Q. When did you get up?

A. Before I came to North Las Vegas.

Q. Did they allow you to get up? [34]

A. Yes, sir.

Q. During that ride back, did any of the officers physically beat you?

A. Only when I first left, after I got in the car. After we come on the main road they didn't beat me.

Q. Did you have any conversation during your ride back with any of the officers?

(Testimony of Ray L. Sage, Jr.)

A. No, sir; not that I remember. It was merely talk, wasn't conversation.

Q. About how long would you say it was from the time you left the police department and your return to the police department?

A. Approximately, I believe, two or three hours, I would say. I couldn't say definitely.

Q. You think you were gone to this particular location on the road some two or three hours?

A. Yes, sir.

Q. Before you were returned? A. Yes, sir.

Q. When you arrived back to the police department, what happened there?

A. Chief Pool said, "Take him over to Henderson."

Q. Who was he directing that remark to?

A. To his officer.

Q. Do you know the name of the officer?

A. Yes, sir; Carlson and Captain Clifton. [35]

Q. Then what happened?

A. He went into the police station there and they pulled out and took me out to Henderson. Booked me out there.

Q. How were you seated at the time of that transportation?

A. I was sitting on the left-hand side of the back seat.

Q. Where was Officer Clifton?

A. On the right-hand side.

Q. Who was driving? A. Carlson.

(Testimony of Ray L. Sage, Jr.)

Q. Did anything happen on your trip over to Henderson?

A. Not physically; they never did nothing physically to me. He gave me a handkerchief to wipe the blood and sand.

Q. Did you have blood and sand on your face?

A. Yes.

Q. Where? A. On my mouth.

Q. How did you have sand on your face?

A. Because it was sandy where I got beat, where I fell.

Q. Do you recall which road you went from North Las Vegas to Henderson?

A. Went out the Boulder Highway. We got to the Boulder Highway I think by some dirt road, it looked like back streets to me they toured through North Las Vegas.

Q. How soon thereafter did you arrive at Henderson?

A. I would say about twenty minutes. [36]

Q. Then where were you taken, if any place?

A. I was taken to the Henderson police station.

Q. Were you handcuffed at that time?

A. No, sir.

Q. Were you escorted into the Henderson police department? A. Yes, sir.

Q. By whom? A. Carlson and Clifton.

Q. What happened there?

A. They booked me on suspicion of burglary and put me in a cell.

(Testimony of Ray L. Sage, Jr.)

Q. Who booked you, the Henderson police department? A. Yes, sir.

Q. Do you know if any one requested that you be booked?

A. Well, I was in the middle going in, I never paid too much attention. All I know, I was booked on suspicion of burglary at Henderson.

Q. Do you know the name of the police officer that booked you at Henderson? A. No, sir.

Q. You didn't know the names of any Henderson police personnel at that time?

A. The only one I knew was Mayor French.

Q. What was your physical condition at the time you were booked at Henderson? [37]

A. I was beat up and after I been there awhile I had a fainting spell and I asked for a doctor.

Q. Who did you ask for a doctor?

A. The officer that came in the jail. I think he came in to get the plates.

Q. Food plates, you mean? A. Yes.

Q. Do you recall what time it was when you were first booked into Henderson? A. No, sir.

Q. Was it afternoon? A. Yes, sir.

Q. Still daylight?

A. Yes, sir; yes, it was daylight.

Q. When you came into the Henderson police department, did you make a complaint to any Henderson police officers concerning your physical condition?

A. When I was in there and the guy was out doing work, must have been a trusty, after they came

(Testimony of Ray L. Sage, Jr.)

in I asked the officers if I could see a doctor and he asked me what was wrong and I pulled down my shirt and showed him.

Q. What did you show him?

A. Showed him my chest and abdomen.

Q. What did they show?

A. It showed the bruises. [38]

Q. How long were you in the Henderson city jail before you requested the officer for a doctor?

A. I don't know what time it was. I was there three hours.

Q. After you showed this officer your chest and abdomen, what next happened?

A. They took me into a room where there was a shower and a chair and put me down and told me to take my clothes off, they wanted to see to what extent I was hurt, and while I was doing that I had a fainting spell and they went outside and I sat there awhile and they told me to put my clothes back on and go outside and they seated me. A doctor was in the room at the time and there was a stenographer came in and they was asking questions about how I got beat and I told them who beat me up and so they called the North Las Vegas police department and while I was sitting there giving a statement the Henderson police had nothing to do with Captain Clifton and an officer named Fleisher and another officer I didn't know, they came in behind me and they went and told Mayor French I jumped out of the car going fifty miles an hour, and so they took me down to the hospital.

(Testimony of Ray L. Sage, Jr.)

Q. Who told Mayor French you jumped out of the car? A. Captain Clifton.

Q. After that you were removed where?

A. To the Rosa de Lima Hospital.

Q. Were you admitted to the hospital? [39]

A. Yes, sir.

Q. How long did you remain in the hospital?

A. Over night.

Q. Were you examined by any doctor or doctors that you recall?

A. I don't recall. All they did, they took X-ray.

Q. When did you leave the hospital?

A. Next morning.

Q. How did you leave?

A. Henderson police department.

Q. Where did they take you?

A. They took me back to the Henderson police station.

Q. About what time in the morning was that, do you recall? A. No, sir.

Q. Was it daylight? A. Yes, sir.

Q. What next happened after you returned to the Henderson police department?

A. I stayed there until that evening and then Carlson and Clifton, they came over and got me and took me back to North Las Vegas.

The Court: Who were the two men that came after you?

A. Carlson and Clifton.

Q. About what time of day was it that you arrived at the North Las Vegas police department?

(Testimony of Ray L. Sage, Jr.)

A. It was dusk, I would say. [40]

Q. What happened when you got there?

A. They started telling me about other confessions they already gotten and said——

Q. Who is this that was interrogating you?

A. Pool. He was behind the desk. I was in front of the desk and he was conversing with me.

Q. What was said?

A. He asked me—he would tell me about confessions he had, if I was ready now to tell him the truth and I asked him who had confessed, so he showed me one of the confessions, so I told him what happened.

Q. Who was present at the time you had this conversation?

A. Carlson, Clifton.

Q. And what next happened?

A. And then they asked me if I wanted to get out of it.

Q. Get out of what?

A. Out of committing the burglary and I told them of course, so they said they would put me on as a star witness.

Mr. Watson: This use of “they” is very confusing. I would like specifically who asked him if he wanted to get out of the burglary.

The Court: You can cross-examine.

(Jury admonished and recess taken at 3:10 p.m.) [41]

(Defendants present with counsel and government counsel present. Presence of the jurors and alternate juror stipulated.)

Mr. Babcock: Your Honor, may I ask leave of the Court, as a matter of accommodation, to withdraw Mr. Sage for the purpose of putting on two witnesses? I spoke to Mr. Watson and he is agreeable, at least, has no objection.

The Court: Very well, permission is granted.

VIOLA TRICK

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name, please?

A. Viola Trick.

Q. Where do you reside?

A. Boulder City.

Q. What is your occupation?

A. Records clerk at Rosa de Loma Hospital.

Q. How long have you been associated with the Rosa de Loma Hospital?

A. Since June, 1955.

Q. You were requested, under subpoena duces tecum, to bring with you certain hospital records relating to a certain Ray Louis Sage, Jr. Do you have those records with you? A. I do.

Q. I hand you, Mrs. Trick, plaintiff's Exhibit 7 for identification [42] and ask you if you can iden-

(Testimony of Viola Trick.)

tify these, consisting of 1, 2, 3, 4, 5, 6, 7 pages—
what is that exhibit?

A. It is medical record of Ray Sage, Jr.

Q. As of what date?

A. February 27, 1956.

Q. Are those records, and particularly the record that you have before you, a record kept in the ordinary course of the operation of the hospital at Henderson?

A. They are.

Q. Are those records in your custody and control as records clerk?

A. From the date of discharge.

Q. What is the date of discharge?

A. February 28, 1956.

Mr. Babcock: I offer into evidence plaintiff's Exhibit 7 for identification.

Mr. Watson: No objection on behalf of Mr. Pool.

Mr. Matteucci: No objection on behalf of defendant Clifton.

The Court: There being no objection, the offer is received in evidence as government's Exhibit 7. These are hospital records in relation to Sage.

Mr. Babcock: You may inquire.

Mr. Watson: No questions.

Mr. Matteucci: No questions.

(Witness excused.) [43]

DR. J. B. FRENCH

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name, please?

A. J. B. French.

Q. Where do you reside?

A. No. 10 Colorado Way, Henderson, Nevada.

Q. What is your profession?

A. I am a surgeon.

Q. Licensed where?

A. Licensed in the State of Nevada among other states.

Q. How long have you been a medical doctor?

A. I graduated in 1940.

Mr. Matteucci: We will stipulate the doctor's qualifications.

Mr. Watson: We will stipulate.

Mr. Babcock: We will accept the stipulation.

The Court: Very well. The record will show that the qualifications of this witness have been stipulated to, particularly as to the medical qualifications.

Q. Doctor, on about February 27, 1956, did you hold an official position in the City of Henderson?

A. Yes, sir; I was mayor of the town.

Q. On that date were you practicing your profession at Henderson? [44]

A. My office is in Boulder City, Nevada.

Q. On that date, February 27, 1956, did you

(Testimony of Dr. J. B. French.)

have occasion to see, talk with and examine a person by the name of Ray Louis Sage, Jr.?

A. That was the name I was given, I believe so, yes, sir.

Q. When did you first see him and under what circumstances?

A. It was approximately 10:00 or 10:30 that evening, I was called to the jail by one of our police officers, whose name I do not remember, requesting my presence at the city jail. Dr. Coogan was visiting with me at the time and he and I proceeded to the city jail and I requested our police officers to open the jail. I didn't know why I was asked to go up there so I inspected all the prisoners, noticing one man who was apparently ill and unsure.

Q. Who was that man? A. Mr. Sage.

Q. Did you give him an examination at that time?

A. Yes; I looked him over and removed him to the Rosa de Loma Hospital and completed the examination I made prior at the city jail, to see that he did receive hospitalization.

Q. Did you have a conversation with him at that time? A. Yes; I asked him——

Q. Who was present, if you recall?

A. Myself and I have forgotten the name of the officer on duty, [45] Coogan and the other prisoners.

Q. Where did the conversation take place?

A. In the jail.

Q. At the time you first examined Mr. Sage in the jail, what did you observe?

(Testimony of Dr. J. B. French.)

A. Well, he was speaking with some difficulty. His mouth had been bruised and abrasion of the left cheek. He had a dozen or fifteen long bruises over his chest and abdomen. He was breathing with some difficulty and I suspected he might have a fractured rib at that time. The abdomen was very sore and tense and I wondered at that time whether he might not be ruptured. He had some fever. The examination went no farther at that time, only to see that he did receive hospitalization.

Q. Did you professionally attend Mr. Sage at the hospital?

A. Yes, we went directly to the hospital.

Q. Who is "we"?

A. The patient and myself and I called the police officers at North Las Vegas for guard duty at the hospital.

Q. Do you recall who it was that came over from the police department at North Las Vegas?

A. I do not.

Q. I show you plaintiff's Exhibit 7 in evidence, which is the Rosa De Lima Hospital records of Ray Louis Sage, Jr., and ask if this is the patient that you treated? [46]

A. Yes; these are the records I made at the hospital.

Q. Upon your arrival at the hospital, what was first done by you, Doctor?

A. Well, the first thing we did was give him vitamin K and other medication to stop any hemorrhages, if there were hemorrhages in the abdomen.

(Testimony of Dr. J. B. French.)

He was put to rest and given some sedation, so that we could observe and see if there was any abdominal bleeding. X-ray was ordered, showed no fracture of the rib.

Q. Did you have occasion to visually observe the condition of his body while in the hospital?

A. Yes.

Q. And what did you observe as the result of your examination at the hospital?

A. At the hospital he had practically the same condition I saw at the jail. His mouth was pretty well swollen, he had abrasion of the cheek, he had about a dozen or fifteen large bruised areas over his chest and abdomen. They were approximately—well, they varied from three to ten inches in length, approximately an inch or inch and a half in width, and just a definite bruise of the skin, with the bleeding under the skin. He had extreme difficulty in breathing, which led me to think he might have a fractured rib. The abdomen was hard. I thought he might have a ruptured spleen, which he bled some, but did not continue to bleed after medication. [47]

Q. Did you observe anything about his wrists and ankles?

A. Yes; he had bruises around both wrists, around one ankle, approximately one-half to one inch in width. They did not totally surround the wrist.

Q. Did you observe on your examination, either at the hospital or at the jail at Henderson, if there were any what I would call a skin burn?

(Testimony of Dr. J. B. French.)

A. The one on the left cheek was the only one I could consider might possibly have been an abrasive burn.

Q. Did you observe any sand or gravel on or about his body at the time of your examination?

A. I did not.

Q. Did you observe any sand or gravel in any of the areas that you testified to? A. No.

Q. Doctor, do you have an opinion as to the nature of the type of wound and its cause?

A. No; I do not believe I could answer that question honestly. The man had bruises over his chest and abdomen. It would be beyond my province to state what caused it, not knowing how it happened or anything else. I can only describe there were bruises over the chest and abdomen, as I described previously.

Q. Have you an opinion as to whether or not the type of injury you observed could have been caused by a person attempting to get out of a moving [48] vehicle?

A. The only way that could be done would be if he hit a pipe, gate pipes, and he was thrown directly onto it, because these were about three or four inches lengths. If somebody was thrown directly over onto a pipe gate, at that time they might have bruises, caused by sudden pressure. There was no bleeding injury.

Mr. Babcock: You may inquire.

(Testimony of Dr. J. B. French.)

Cross-Examination

By Mr. Watson:

Q. Dr. French, would you say that the nature of the injuries, bruises, to Mr. Sage's chest and abdomen, would reasonably correspond to his having been struck with a flashlight ninety times?

A. I didn't say that, no.

Q. I know you did not. I am asking, would it be possible, in your opinion, that the injuries which Mr. Sage showed at that time, could be the result of having been struck forceable in the abdomen and chest ninety times with a flashlight?

A. Are you asking me about the number of bruises I saw or the nature?

Q. You told us you saw from twelve to fifteen bruises.

A. That is correct.

Q. Let me put it this way—if Mr. Sage had sustained ninety blows with a metal flashlight to the abdomen and chest, would he, in your opinion, have shown only twelve to fifteen bruises, which is what you saw, or would he not have been much more [49] gravely injured?

A. I believe this would depend on the force applied back of the flashlight. I think it is possible through clothing to get a blow with a flashlight and show no bruise. I do think it possible the bruises I saw to have been inflicted by a flashlight or any other instrument. I wouldn't say ninety bruises—there were about twelve or fifteen bruises. I stated

(Testimony of Dr. J. B. French.)

in my opinion the bruises that were there could have been caused by a blunt instrument, such as a flashlight, the ones that were there. I said a person, if struck ninety times, might or might not show any bruises, depending upon the strength or force of the blow. I can't go any farther than that.

Q. Assuming that a person was truck say ninety times with sufficient force, so that on a great many of those ninety occasions he was knocked to the ground, would he not, in your opinion, show bruises for most of those ninety blows?

A. If the blow was struck with sufficient force to knock a man to the ground, it should certainly show a bruise.

Q. With regard to the skin mark or abrasion on Mr. Sage's temple, would you say that that was a fairly obvious one, which a casual observer would notice if he glanced at Mr. Sage's face?

A. I don't know. It was present, but not marked. It wasn't enough that my attention was immediately drawn to it.

Q. In regard to the injury to Mr. Sage's mouth, did that injury [50] result in considerable swelling of the lip? A. Yes; considerable swelling.

Q. Was only the upper lip swollen or were both the upper and lower lips swollen?

A. Both swollen.

Q. Were they swollen to a degree which would direct the attention of a casual observer who happened to glance at Mr. Sage? A. Yes.

Q. They were quite prominent?

(Testimony of Dr. J. B. French.)

A. Quite prominent.

Q. Did you, when you examined Mr. Sage at the hospital, which I believe you told us was the second examination, examine his entire body, or only his abdomen and chest?

A. He was stripped completely.

Q. If Mr. Sage had had any wounds or abrasions to say his shoulders or back, would you have detected their presence?

A. Yes, sir; he was stripped.

Q. If he had any wounds, say to his posterior or to his legs, would you have detected their presence?

A. I did. He had bruises on his left ankle.

Q. It appeared to be rather swollen, did it?

A. His ankle was swollen somewhat. It was more of an abrasive thing, like a rope or something on that order.

Q. But you saw no bruises whatever on any part of Mr. Sage's body, other than the abdomen and the chest, is that right? [51]

A. That is all I saw, and his wrists, his left cheek and left ankle.

Q. In your opinion, Doctor, if, in addition to having received some ninety blows with a flashlight, Mr. Sage had within a few hours prior to your examination been kicked a number of times with force sufficient to knock him to the ground, would that kicking, plus the injury to his lip, plus the ninety blows with the flashlight sufficient to knock him

(Testimony of Dr. J. B. French.)

to the ground, wouldn't that all be calculated to put Mr. Sage into a rather immediate state of shock?

A. That depends on the individual. He would certainly be in pretty bad shape if it involved all you enumerated.

Q. Doctor, if this man had had ninety flashlight blows hard enough to knock him to the ground, plus a number of kicks hard enough to knock him to the ground, plus the blow in the mouth, would it not be highly probable that the man would show some other sign in his face of the injury?

A. What type of sign?

Q. Bloodshot eyes, quivering nostrils, quivering lips.

A. This man was in severe pain when I saw him and showed evidence of it.

Q. Did he appear to have been crying?

A. No; I don't know if he had been crying. I didn't make a note of it.

Q. Dr. French, in your experience have you treated many [52] persons who have been subjected to physical beating? A. Yes; I have.

Q. Have you ever, in your experience, treated a man who has been subjected to as severe a physical beating as I have described, who was in as good condition as Mr. Sage when you examined him?

A. This again, I think, takes us back to the strength of the blows. In my opinion when the blows of a flashlight is enough to knock a man to the ground, and if he was struck with this force ninety times, the man would probably not be in good con-

(Testimony of Dr. J. B. French.)

dition, and this man was not in good condition. That is why I required immediate hospitalization.

Q. As a matter of fact, Doctor, don't you think, assuming the ninety blows with a flashlight are enough to knock a man to the ground, plus additional injuries we have described, the hard kicking, the bruises, that very severe internal injuries would have resulted, isn't that correct?

A. From the bruises I saw on the chest and abdomen I expected internal injuries.

Q. But in fact they didn't develop, isn't that true?

A. No; due to the medication that we gave, we did have the blood stopped. There was definitely some internal injury to this man.

Q. Would you describe it as being a very grave internal injury?

A. Any internal bleeding is grave unless controlled. This [53] happened to be controlled, so it was not grave. If not controlled it would continue very serious.

Q. Did you suspect an injury to the stomach?

A. The spleen lies next to the stomach.

Q. But not to the stomach?

A. I didn't feel so.

Q. Did you suspect any internal injury to the small intestine?

A. It is hard to hurt a soft organ, such as the stomach or bowel with a blow. It is usually some other organ, like the spleen or liver.

Q. The spleen, in comparison to the liver, is a

(Testimony of Dr. J. B. French.)

great deal larger? A. That is true.

Q. And it occupies quite a good deal of space in the normal person of the upper abdominal cavity, is that right? A. Yes.

Q. Did any of the bruises cover completely the area in which the liver is located?

A. Yes; I believe they did overlay part of it. Most of the injury was on the left side, overlaying the upper abdomen and left side of the chest.

Q. And you did not diagnose at any time any rupture to the liver? A. I did not.

Mr. Watson: No further questions. [54]

Mr. Matteucci: No questions.

Mr. Babcock: No further redirect.

(Witness excused.)

Mr. Sage resumed the witness stand.

RAY L. SAGE, JR.

Direct Examination
(Continued)

By Mr. Babcock:

Q. Mr. Sage, before you were asked to step down, I believe you testified that you had been returned to the North Las Vegas police department, at which there there was an interrogation of you by Officers Pool, Clifton, and who was the other man?

A. Carlson.

Q. Now will you state what was said and what was done at the time of this interrogation?

(Testimony of Ray L. Sage, Jr.)

Mr. Watson: Were we up to the 28th, the following day?

Mr. Babcock: Yes.

Q. When you discuss the conversation, will you state what was said and the name of the person who said it, if you can recall.

A. Well, Chief Pool did most of the talking, I remember that, and he said he had a statement to the effect I was involved in the burglary and I asked him to see it, and that was about all it was. I knew they had a statement, so I read the statement. So I told the truth.

Q. What did you tell them with reference to this burglary?

A. I told them the Little Giant Market was burglarized and Foodland Market and the Valley Market.

Q. Did you give them a written statement at that time? [55]

A. Yes.

Q. Did you sign that statement?

A. Yes, sir.

Q. Were you asked by any of these officers, and if you did, which one, to make a statement concerning your injuries?

A. Say that again.

Q. At the time that you were returned from Henderson to the North Las Vegas police department, on February 28, 1956, were you asked by any North Las Vegas police officer to give a statement concerning the cause of your injuries?

A. Yes, sir.

Q. Who made that request?

(Testimony of Ray L. Sage, Jr.)

A. Chief Pool.

Q. Who was present at the time?

A. Capt. Clifton.

Q. Was any one else present, if you recall?

A. No, sir.

Q. What was said by Chief Pool concerning this matter?

A. Well, first they wanted me to make a statement I jumped out of the car going fifty miles an hour. They had already made out a report to that effect.

Q. They had already what?

A. Made a report, officer's report, something like that.

Q. And did they show you that officer's report?

A. I think so, I don't remember now. [56]

Q. Continue as to the conversation you had with Chief Pool.

A. That was about the extent. I told them I wouldn't use that as an excuse for getting beat up, because it would involve me in the 101 Club burglary, which I didn't do, so I told them no, I wouldn't make a statement in that, so they asked me——

Q. Who asked you?

A. Just a general conversation, and so they figured out I fell, so we made out a statement to that effect.

Q. Who wrote it out? A. I did.

Q. Did any one tell you what to write?

(Testimony of Ray L. Sage, Jr.)

A. Yes, sir.

Q. Who?

A. Capt. Clifton and Chief Pool both did.

Q. How did they go about it?

A. By telling me what to write down and asked if it sounded all right to me.

Q. What did you put in this statement, do you recall?

A. I just put—I can't recall the statement, I mean everything—but it was just to the effect that I fell with a slot machine on my chest, made all those bruises, and there was no physical violence of any sort against me.

Q. Where were these slot machines at the time you are speaking of?

A. They were supposed to be at the Foodland Market. [57]

Q. Why did the officers ask you to write such a statement?

A. Well, so it wouldn't be held against them, I guess.

Q. Was that true or not? A. What?

Q. How did you receive your injuries?

A. I received them by a beating by Capt. Clifton.

Q. At any time did you make an attempt to jump out of the car? A. No, sir.

Q. While you were in custody of the North Las Vegas police department? A. No, sir.

Q. At any time did any slot machines drop upon your person? A. No, sir.

Q. About what time of day was it on February

(Testimony of Ray L. Sage, Jr.)

28th when you came back to the North Las Vegas police department and this interrogation?

A. It was in the evening. I don't know what time it was. I didn't know what time it was between the morning of the 25th, I didn't know what time it was until they took me to jail. I never seen a clock.

Q. Do you know what happened to the statement that you wrote concerning the slot machines falling on your person?

A. No, sir; I do not know.

Q. After you had made that statement in writing then what happened? [58]

A. Then I was taken to the city jail.

Q. By whom?

A. I don't remember; I think it was Capt. Clifton and Carlson.

Q. Did you have a conversation with Capt. Clifton on the way to the city jail, if you recall?

A. No, sir; not that I recall.

Q. What happened when you got to the Las Vegas city jail? A. They put me in the jail.

Q. Did you make a complaint to any one at the city jail? A. No, sir.

Q. Upon your admission to the city jail by the jailer then on duty, did he examine your person, physical examination? A. No, sir.

Q. Did any one examine you at that time?

A. Not that I remember. I can't remember whether they examined me or not. I think they just

(Testimony of Ray L. Sage, Jr.)

had me take my shoes off, is about all. My belt—I didn't have no belt.

Q. After you were admitted to the Las Vegas city jail, at any time did you return to the North Las Vegas jail?

A. No, sir. I didn't know they had a jail.

Q. Not the jail, I mean the police department?

A. No, sir.

Q. With reference to this burglary that you have testified to, did you admit your guilt?

A. What was that again? [59]

Q. With reference to the burglary that you have testified to, did you admit your guilt?

A. Yes, sir.

Q. And by reason of that, were you thereafter sentenced to prison?

A. Yes, sir.

Q. Where?

A. Carson City.

Q. You have since then been released from the Nevada State Prison?

A. Yes.

Q. And you have been convicted of a felony, is that correct?

A. Yes.

Q. Now at the time you returned to the North Las Vegas police department on the evening of February 28th, was there any inducement or promise made by any of the officers for your giving the statement that a slot machine fell upon your body?

A. Yes, sir.

Q. What was that and what was said, by whom?

A. Well, Chief Pool did most of the talking. I don't remember now exactly who said it, but they said they would put me on as a star witness if I

(Testimony of Ray L. Sage, Jr.)

would make out the statement, and I don't remember, I think I said no, or something like that; anyway I gaged around, so they said they were going to take blueprints of the burglary and had about fourteen of them at the [60] time and said they were going to take them all and charge each one to have ten years in prison. I guess I didn't make out the statement.

Q. That was the remark you made?

A. No, sir; I just said that now.

Mr. Babcock: You may inquire.

Cross-Examination

By Mr. Watson:

Q. Mr. Sage, do you recall my being in Carson City last winter, I came to see you?

A. I remember a lawyer.

Q. Do you remember it was me?

A. You look familiar.

Q. You told me there in Carson City, did you not, that you had been dressed on February 27th, in a sort of T-shirt and a windbreaker and pair of slacks, is that right?

A. No, sir.

Q. How were you dressed?

A. I was dressed in a pair of blue corduroy slacks and a wool plaid shirt.

Q. What color was it?

A. I don't know—I mean it was different colors.

Q. Did you have a jacket on? A. No, sir.

Q. Just the shirt and trousers, is that right?

(Testimony of Ray L. Sage, Jr.)

A. Yes. [61]

Q. Was it a thick shirt?

A. Not exceptionally thick.

Q. On these times, Mr. Sage, I think you were arrested about nine o'clock, in that right?

A. Yes, sir; about.

Q. And did you manage to go to the police station? A. Yes, sir.

Q. And when you got there, you were there just a short time, fifteen minutes? A. Yes.

Q. And then about an hour and a half went by while you sat there and no one paying any attention to you, is that right? A. Yes.

Q. And then a period of a very few minutes when you were taken out to the car and questioned there, is that right?

A. Yes, sir; just took a few minutes to do it.

Q. All that time adds up to about two and one-half hours, wouldn't you say?

A. I can add. I told you before I can't remember the exact time.

Q. Give me your best recollection. Wouldn't that add about two and one-half hours between the time you were arrested and the time you started off on this trip you told us about out in the country?

A. Close. [62]

Q. So that places the time that you started your trip more or less about half past eleven, is that correct?

A. I don't know whether it is correct or not.

Q. What is your best recollection?

(Testimony of Ray L. Sage, Jr.)

A. Well, my best recollection on the time was about that; I was just guessing.

Q. After you got there, I think you told us that this entire affair, with the several stops made and this extensive beating, required about an additional hour and a half, is that right?

A. No, sir; I didn't say.

Q. How long would you say the whole round trip took, going to this place in the country and the beating up there and trip back to the police station?

A. I couldn't exactly say, putting it all together.

Q. Well, would you say it was closer to ten minutes or two hours?

A. I wouldn't say neither one of them.

Q. Mr. Sage, I believe when you were at Henderson and Dr. French was there, in his capacity as mayor and capacity as physician, you made a short statement didn't you? A. Yes, sir.

Q. And you told us about the statement on the night of the 28th that you made back in the police station in North Las Vegas, that is, when they brought you back. You have already told us about that? [63] A. Yes, sir.

Q. When you were at Henderson and you were first telling your story, Mr. Sage, you didn't really know any of these people by name, did you? You hadn't known them before?

A. Pool, I am sure he told me his name.

Q. Do you recall telling me in Carson City that you had identified Mr. Pool from a large group photograph of the North Las Vegas police depart-

(Testimony of Ray L. Sage, Jr.)

ment that was handed you by Harvey Dickerson, the District Attorney? Do you remember that?

A. I don't know who the guy was, but I remember a picture that was shown to me.

Q. There were about twenty or thirty men in that picture, weren't there?

A. I don't know how many.

Q. A good many? A. Yes.

Q. And you picked one face out of that picture, is that right? A. No, sir; I picked three.

Q. Those were the faces of Detective Carlson, Chief Pool and Capt. Clifton, correct?

A. Yes, sir.

Q. And didn't you tell me in Carson City that until that time you didn't know which one was which, the names of any of them? Isn't that what you told me? A. No, sir. [64]

Q. What is the truth of it, Mr. Sage, did you know these people before, at the time that this supposed beating took place?

A. Well, that would be kind of hard to say, because I knew I knew Pool, but I couldn't say, I can't remember, whether Capt. Clifton told me his name, or Carlson.

Q. All right, sir. I would like to show you defendants' Exhibit A and have you look it over and tell me whether or not you know what that is?

A. That sort of looks like the statement I made at Henderson.

Q. Is that your signature on the second page?

A. Yes, sir; it looks like it.

(Testimony of Ray L. Sage, Jr.)

Q. Do you see the notary's seal right down here in this corner, Mr. Sage, and the name, A—W. Williamson, handwriting?

A. Yes, sir; I see a seal and name.

Q. And it says there, does it not, "Subscribed and sworn to before me this 28th day of February"?

A. Yes, sir; I see it.

Q. Was Miss Williamson, a notary public there in error, or was it true that at that time in Henderson, in the custody of the Henderson police department, you did swear to that statement? Did you swear to it or is Miss Williamson, the notary, wrong?

A. I don't remember Miss Williamson, to tell the truth.

Q. Did you swear to the statement, do you recall that? [65]

A. No, sir; I don't recall that.

Q. I want to ask you to please look at one portion of this statement, Mr. Sage. It begins——

Mr. Babcock: If the Court please, I don't believe this is in evidence.

The Court: It is not in evidence.

Mr. Watson: No, your Honor, I have not yet offered it.

Q. It begins right here, just here at this place, I would like you to read that, please?

A. Yes, sir; I have read it.

Q. Doesn't that say, Mr. Sage, that you thought it was the chief of police, but you didn't know whether there was a chief of police.

(Testimony of Ray L. Sage, Jr.)

Mr. Babcock: Your Honor, I believe before any reference is made to the contents of the exhibit, it should be offered. I object on that grounds.

Mr. Watson: I offer it now, your Honor, for the purpose of impeaching the credibility of the witness. He admitted he signed it with his signature and it appears to be a statement given by him at Henderson.

Mr. Babcock: May I see it, counsel? No objection.

The Court: The offer may be received in evidence as Exhibit A of the defendant Pool.

Q. I will go back to the place where we were, Mr. Sage. I will ask you please to read this question right here, read to [66] the jury.

A. You want me to read it out loud?

Q. If you will, please.

A. "Do you know definitely who the police were? Do you know their badge? No, not for sure."

The Court: That question was directed to a badge. I just don't understand the import. Does that mean he didn't recognize the person?

Q. Will you go on just here, please, sir, right here, the second part of your answer, beginning with "three men."

A. "Three men were working on me and after they took the handcuffs off and the chief of police—I think it was chief of police—took me down in a gully. The cop was standing down there. They took me down and talked a little bit."

(Testimony of Ray L. Sage, Jr.)

Q. Did you really know the name of the man you refer to when you said, "A cop was standing at the gully"? Did you know the name of the cop that was standing there at that time?

A. That is a hard question to answer, since you want it definitely. I knew the chief of police before anything else like that happened. He introduced himself when I first came to the police station.

Q. I will show what is marked for purposes of identification defendant Pool's Exhibit B, and ask you to examine this document, of several pages, and tell me whether or not you know what it is?

A. Yes, sir. [67]

Q. Please look at each page, Mr. Sage, to be certain.

A. You mean you want me to read it all?

Q. No, just glance at it and make sure each page is something that you recognize.

A. Yes, sir.

Q. Do you know whose handwriting it is in?

A. Yes, sir.

Q. Whose? A. Mine.

Q. Whose name is signed at the end?

A. Ray L. Sage, Jr.

Q. Is that your signature?

A. Yes, sir; it looks like it.

Q. That is statement that you gave on the night of February 28th at the North Las Vegas police department? A. As far as I know.

Q. Would you like to examine it further to make sure? A. It looks to me like the same.

(Testimony of Ray L. Sage, Jr.)

Mr. Watson: The defendant Pool offers in evidence Defendant Pool's Exhibit B, if the Court please.

Mr. Babcock: May I inquire on voir dire?

The Court: You may.

Voir Dire Examination

By Mr. Babcock:

Q. Is this the statement you signed or was it on a different type of paper? [68]

What kind of paper was it, if you recall?

A. It was white.

Q. Was it in ink or pencil?

A. It was in ink.

Q. What did you do with that statement after you had written it and signed it?

A. They had it. I didn't do nothing with it.

Q. Do you know where it is now?

A. No, sir.

Mr. Babcock: Your Honor, I object to the introduction of this particular exhibit on the ground it is not the best evidence. It appears to be a photostatic copy of a statement. While we have no objection to the original, we would object to the photostatic copy being introduced.

Mr. Watson: If the Court please, in regard to the best evidence objection, Mr. Pool is completely unable, in his present position, having no access to the official records, to produce the original. The witness identified each page as being his handwriting and

(Testimony of Ray L. Sage, Jr.)

I think the policy of the best evidence rule is certainly satisfied by that statement by Mr. Sage.

The Court: Let the Court see it. What efforts did counsel make to obtain the original?

Mr. Watson: Your Honor, I made extensive perusal of the records of the North Las Vegas police station, going through everything they said they had available there. Chief Bunker was [69] very co-operative in that respect, and after a careful inspection of everything they said was contained there, I was forced to rely upon this copy, which was one that Mr. Pool had had made while he still occupied his official position, retaining the copy for his personal possible future use and, of course, leaving the original in the official records, and I feel I have shown due diligence, your Honor.

The Court: Any further comment, counsel?

Mr. Babcock: I have this comment, your Honor—that we have no objection to the admission of the statement, provided that the original is furnished. Now counsel has stated he has made a perusal of certain of the records. The original obviously was a public document on file, or at least maintained by the North Las Vegas police department and I should think it would be incumbent upon counsel to subpoena the custodian of those particular records relating to this matter and if they are not here, the original that is, that there should be some explanation for it.

The Court: The Court will withhold ruling on this offer at this time and give counsel an oppor-

(Testimony of Ray L. Sage, Jr.)

tunity to make a further attempt to produce the record.

Mr. Watson: May I retain possession of it, your Honor?

The Court: Yes.

Q. On that night of the 28th, when you went in to make a [70] statement, you were introduced to Al Ferguson, police commissioner, were you not?

A. I can't remember.

Q. Do you otherwise know or recall Mr. Al Ferguson?

A. I have seen him today. I have seen him at the police department too, but I didn't know him at the time.

Q. Wasn't the situation, when you made that statement, that you and Mr. Ferguson and Mr. Pool were alone together in a room and Mr. Clifton wasn't there? A. I can't remember that.

Q. You told us that they told you what to say in your statement the night of the 28th. Now who was it specifically who told you what to say?

A. It was general conversation and I wouldn't say one told me. I would say all of them.

Q. By saying general conversation, do you mean that Detective Carlson and Capt. Clifton and Chief Pool, all three, told you what to say?

A. No, sir.

Q. Was the statement dictated to you and then copied out in your handwriting?

A. Not exactly.

Q. Was it in your own words?

(Testimony of Ray L. Sage, Jr.)

A. In my own words.

Q. Was all of the statement that you gave that night true? [71]

A. No, sir.

Q. Is it all false?

A. There are parts in there that are true.

Q. And parts that are false?

A. Yes. It all leads to being false.

Q. Isn't it so, Mr. Sage, that the statement that you gave that night did not clear or take out of the picture Mr. Clifton at all, but rather put Mr. Clifton and Mr. Carlson in the picture and left Mr. Pool out? By being in the picture, I mean didn't you say that night that it was Carlson and Clifton that beat you?

The Court: That question is not understandable. Reframe it.

Q. What did you say that night in this statement, if you recall?

A. I don't recall what I wrote in the statement.

Q. Did you make any statements after this one to agents of the government?

A. After that one, yes, sir.

Q. Did you make any statements after this one to persons connected with the Clark County District Attorney's office?

A. Not that I recall. I do not recall. I know I talked to the district attorney. I think. I didn't know his name or anything.

Q. When you were in Henderson and you had had your conversation [72] with Dr. French, Mayor French, and the other people from the Henderson

(Testimony of Ray L. Sage, Jr.)

police department who were there and you had had your night's stay in the hospital, did you know ahead of time the next day that you were going to be turned back over to the North Las Vegas police department? Did you know where you were going?

A. With reference to that question, right there I did not know.

Q. Did you realize where you were going when you saw Carlson and Clifton show up, come into the room, to take you out on the 28th?

A. Not that I recall.

Q. You didn't figure out that you were going back to North Las Vegas?

A. I didn't know. I was kind of scared I was going to get beat up again.

Q. Did you ask Mayor French, or any policemen over there, not to turn you back to the North Las Vegas police? A. No, sir.

Q. You were scared you were going to be beat up and you didn't say anything?

A. Not exactly scared, but I had that idea, also I had already gained a little bit—I started to say——

Q. Please finish.

A. I started to say something that really——

Q. You told me in Carson City that you played football on the High School team in West Virginia, didn't you tell me that? A. Tell who?

Q. Me. A. Maybe, I don't know.

Q. Well, you did play football in High School?

A. Yes, sir.

(Testimony of Ray L. Sage, Jr.)

Q. Did you learn anything there about how to protect yourself from getting hurt if somebody was perhaps jumping on you or kicking you, something like that?

A. Yes, when they run against me I should run if I could run; if I couldn't put my hand over my body.

Q. Did you ever in football days kind of crouch down, up into sort of a ball and turn your head down like this to protect your head and body as much as you could? Did you ever do that playing football?

A. Yes, sir.

Q. But this time, when you were getting those ninety flashlight blows, every time you got one, you hopped right up again, is that right?

A. I don't remember saying that.

Q. What did you say?

A. I said I had to get up.

Q. Did you come back each time?

A. Yes, sir. [74]

Q. They knocked you down and you came up, they knocked you down and you came up?

A. Yes, sir.

Q. And that happened many many times?

A. I don't know it hapened many many times. It took a few blows to knock me over.

Q. You told us on direct examination that they, that is the officers there, on February 28th, in the North Las Vegas police department, told you to say that you had a slot machine fall on you when

(Testimony of Ray L. Sage, Jr.)

you were carrying it out of the Foodland Market, is that what you said?

A. Yes, sir; that is what they had me to say.

Q. Is it true while you were carrying one of the slot machines out of the Foodland Market that morning at six o'clock you did stumble and fall and a machine fell on your chest and abdomen?

A. No, sir.

Q. Who thought of that idea to say that?

A. I can't say exactly who told me that. It was between all three of them.

Q. But the principal part of your bruises, Mr. Sage, were all on your stomach, your abdomen and your chest. The fact that a slot machine had fallen on that area of your body would account for it, wouldn't it?

A. Yes. I don't know whether it would or not. I don't know the extent of the damages. [75]

Q. You didn't get any of these blows while you were lying down out there; you were standing up every time?

A. Which place are you talking about?

Q. The ninety blows with the flashlight, and I think you said twenty times or thereabouts that Mr. Pool kicked you. Let us take the ninety blows with the flashlight. You got every one of those standing up, didn't you?

A. As far as I know I did.

Q. Well, were any of the people standing behind you who were out there, Carlson or Clifton?

A. Carlson, I never noticed him much.

(Testimony of Ray L. Sage, Jr.)

Q. Nobody there came from behind, did they?

A. Yes.

Q. Who hit you?

A. No one hit me, I was kicked from behind.

Q. By whom? A. Carlson.

Q. Mr. Carlson kicked you? A. Yes, sir.

Q. Did he make any bruises when he kicked you from behind?

A. I don't know; I couldn't see.

Q. Were you sore when you sat down?

A. Yes, sir; I was sore all over. I can't say definitely.

Q. Did anyone kick you in the legs in front or behind?

A. I don't know, don't remember. [76]

Q. Do you think if they had you would have remembered it?

A. I couldn't say because there was a lot of pain at the time. I wasn't thinking too well.

Q. After you finished your high school in West Virginia, you worked for awhile in the coal mines, I think you told me, is that right?

A. Yes, sir.

Q. And at the time of this arrest you weighed about 215 pounds?

A. Approximately, I think.

Q. A pretty big and husky fellow?

A. Yes.

Q. But you didn't fight back at all?

A. No, sir.

Q. You offered no resistance at all?

(Testimony of Ray L. Sage, Jr.)

A. No, sir.

Q. Where was the pistol that Mr. Clifton was carrying? Did he have it on the coat of his brown suit?

A. I don't recall where he had it. I never saw it.

Q. But suddenly he had a pistol?

A. Yes, sir.

Q. Did Pool have a pistol?

A. Not that I recall. He told me to get down in the seat.

Q. Where did he pull it out?

A. When we left North Las Vegas.

Q. Where was he carrying it on his body? [77]

A. I don't remember. I wasn't looking at the time.

Q. Did Carlson have a pistol?

A. He was around when we were there, after I got beat up, when I was down in the gully.

Q. Did he pull his pistol on you, too?

A. He ran down the bank and pulled it toward me.

Q. After you made your statement on the night of the 28th at the North Las Vegas police department, Mr. Sage, didn't you go out with police commissioner Ferguson and some other people to have a meal?

A. Yes. There was only one right with me.

Q. Who was that?

A. Capt. Clifton. I was sitting beside him on the other side.

Q. Was the atmosphere friendly?

(Testimony of Ray L. Sage, Jr.)

A. Yes, sir.

Q. Was it friendly because as you said, you told us, all you had to do was to sign this statement that night on the 28th and you could get out of these burglary charges? That is why it was friendly?

A. I guess it would be that way. We was talking, went out and picked up another guy at the bar, stopped and picked up a guy and they were talking.

Q. And afterward you went to the city jail here in Las Vegas, is that right? [78]

A. Yes, as I recall.

Q. And you were in the city jail?

A. Yes, sir.

Q. The North Las Vegas police department didn't deliver on this bargain they made with you to drop the burglary charges, did they?

A. Well, I hadn't been picked up for it.

Q. As a matter of fact, you were convicted on a burglary charge, weren't you?

A. Yes, I pleaded guilty.

Q. Did you plead guilty because you were guilty, or for any other reason?

A. Because I was guilty.

Q. And the promise that the North Las Vegas police department, Carlson, Clifton and Pool had made you, you say to get you out of it if you signed that statement that night, wasn't carried out, was it?

A. No, sir.

Q. Did you make any complaints about it?

A. I didn't make any complaints about it.

(Testimony of Ray L. Sage, Jr.)

Q. You didn't try to get them to carry it out?

A. I never saw them.

Q. Did you ask to see any of them?

A. No, sir.

Q. Mr. Sage, the idea has been expressed here of getting out [79] of the burglary charges in return for a statement. Isn't the truth of the matter that when you did not get out of the burglary charges is when you made your complaint against Pool and Clifton?

A. No, sir. I pleaded guilty at the hearing, or whatever you call it, the Justice Department on the other side of the county building, across the street, I pleaded guilty and I came over and they took me to the county jail and they found out about me getting beat up. I don't know how they found out about it. I know there wasn't no use lying, so they gave me a lie detector test, so I knew there was no use lying about it then.

Q. You told us that you admitted three burglaries, right?

A. Yes.

Q. You were not prosecuted for the other two, were you?

A. No, sir.

Q. Did any one ever explain to you why you were not prosecuted for the others?

A. Not that I recall.

Q. Did any one ever indicate to you in any way that it would have something to do with this case, being a witness in this case?

A. No, sir. I haven't heard about it. I just

(Testimony of Ray L. Sage, Jr.)

thought they put it all together and charged me with one charge.

Q. You served about ten months on the one to fifteen sentence?

A. Yes, ten months and two days. [80]

Q. And you are now fully pardoned—what is the condition?

A. Commuted.

Q. And in other words, the sentence is done?

A. Yes, sir.

Q. You told us, when Mr. Babcock was questioning you, that at the time all this happened, you were a permanent resident of West Virginia, correct?

A. Yes, sir; I was a permanent resident. I don't recall telling him about being a resident of West Virginia.

Q. But since you got out of the penitentiary you have been a permanent resident of Las Vegas, is that right?

A. No, sir.

Q. Where do you live?

A. Marlinton, West Virginia.

Q. Haven't you been in Las Vegas most of the time since you got out?

A. No, sir; never been in Las Vegas until I just came.

Q. Not at all?

A. No, sir.

Q. You have gone back home with your family?

A. Yes.

Q. While you were in the hospital in Henderson did you make any statement to Mr. Fisher, Sgt. Dan Fisher, about why you brought up the whole sub-

(Testimony of Ray L. Sage, Jr.)

ject of being injured? A. Not that I recall.

Q. Did you have any conversation with Danny Fisher at all about this claim that the North Las Vegas police department had beaten you?

A. He was in the hospital. He was guarding me in the hospital.

Q. He was in the same room?

A. Yes, sir. I don't know whether we talked much about it.

Q. You don't recall making any statement about that? A. No, sir; not that I recall.

Q. Did you have, as your purpose in making the complaint about the beating, the idea in some way that you might get out of your own problems, shoving that off on the police officers? Wasn't that your purpose? A. Would you say that again?

Q. Didn't you have, as your purpose in bringing this whole thing up, beatings, the idea that you could get Chief Pool and Capt. Clifton and Detective Carlson to turn you loose? A. No, sir.

Q. When you first got to the police station on the morning of the 27th and they talked to you about fifteen minutes, they told you, did they not, that on the floor of the rent car that you had used there was imprint of the slot machine? Didn't they say that? Floor of the trunk?

A. No, sir; not that I recall.

Q. The floor of the trunk of the car that you and Mr. Gaither were using had a regular rubber map and a soft gummy, tarry [82] substance underneath exposed, wasn't it?

(Testimony of Ray L. Sage, Jr.)

A. I don't know, I never noticed it.

Q. Didn't they tell you, during that fifteen minutes, they found a number of loose quarters and dimes over in the corner of the trunk of that car?

A. They mentioned the subject.

Q. Well, is that what they told you?

A. They said there were some dimes and change in the trunk, yes, sir.

Q. Didn't they tell you there had been a complaint go out and orders within three hours of the time of the burglary, because one of the tires on the car you used was worn smooth and they had a distinct trail—distinct rather than having no trail at all—didn't they tell you that in this fifteen minutes?

A. I can't rightly remember.

Q. Didn't they tell you Sgt. Miller made a cast of that tire, which is the way they identified the car right in close of your place?

A. Yes, I do remember them saying something about a cast, they made a cast, but I thought it was of the foot, the shoe.

Q. That is another thing. They told you during that fifteen minutes that they had found a heel print just inside the door of Foodland Market and matched to that print of the heel of the shoes you were wearing, didn't they tell you that?

A. No, sir. [83]

Q. They told you something about the feet?

A. I don't remember, but they looked at the shoe on my foot and I showed it to them.

(Testimony of Ray L. Sage, Jr.)

Q. Didn't you ask, too, how it was they be able to solve the thing, picking you up that fast?

A. No, sir.

Q. When Carlson and Clifton took you from the North Las Vegas police station the afternoon of the 27th—that is the day of the Foodland burglary—you say they drove you around quite some time, isn't that what you said? A. Yes, sir.

Q. They just took a bunch of short cuts?

A. I don't know whether short cuts or what, but I do distinctly remember the dirt road, not passing through Vegas.

Q. You know where College Boulevard is?

A. Yes, sir.

Q. Do you know where Nellis Boulevard is?

A. Yes, sir.

Q. Isn't it true that near the intersection of those two streets, or within five or six blocks of it, you did try to jump out of the car?

A. No, sir.

Q. Who made up that story? Which one of the officers made up that story?

A. Well, I don't know which one made it up. [84]

Q. Was it one of the officers who made it up?

A. I guess so. It had to be somebody connected with the police department that made it up.

Q. And so your testimony is that the three officers, Pool, Carlson and Clifton, made up two stories; they made up the story that you tried to jump out of the car and then they made up the

(Testimony of Ray L. Sage, Jr.)

story that the slot machine fell on you, is that your testimony?

A. I never said that Pool and Clifton made up the story I jumped out of the car.

Q. Who did?

A. I don't know who did. They put it in the record.

Q. Didn't you tell me that they asked you to put it in the statement, that you tried to jump out of the car?

A. Yes, they wanted me to make a statement to account for the bruises, physical damage I had on my body.

Q. All right; then, Mr. Sage, which one of the officers asked you to say in a statement that you had been hurt trying to jump out of a car near the intersection of Nellis and College?

A. I don't recall which one said it.

Q. Do you now recall which one of the officers told you to say that you dropped the slot machine on yourself getting out of the Foodland Market?

A. No, sir; they both was giving me things to write down, so I don't recall exactly which one said it. [85]

Q. By both, who do you mean?

A. Pool and Clifton.

Q. Not Carlson? A. No, sir.

Q. Did you have a scratch on your left arm or wrist some place?

A. I don't recall which arm it was, but there was a ring mark made on the skin, yes.

(Testimony of Ray L. Sage, Jr.)

Q. Are you absolutely sure that you did not have that that morning before you were even arrested?

A. I couldn't say absolutely sure, but they turned my wrist like that and put handcuffs on it.

Q. You were an airman at Nellis?

A. Yes.

Q. Were you provided by the Air Force with quarters on the Base? A. Yes.

Q. But you did not live there?

A. Part of the time.

Q. But you maintained a regular room at the Grande Court, is that right? A. No, sir.

Q. But you were at the Grande Court a good deal? A. Yes, sir.

Q. And you had several friends who stayed there—Gaither was one of them? [86]

A. Yes, sir.

Q. And Jerry Fritzell was another?

A. Yes.

Q. What was the name of the fellow whose car you used? A. Balzar.

Q. He was another friend? A. Yes.

Q. And Frank Farola? A. Yes, sir.

Q. And Farola and Balzar had their wives also? A. Yes.

Mr. Rittenhouse: If the Court please, we object to this line of testimony. It is irrelevant and immaterial.

The Court: I can't see, counsel, where it has anything to do with the picture.

(Testimony of Ray L. Sage, Jr.)

Mr. Watson: If the Court please, I am gradually developing something I think should go in.

The Court: Do you have to spend all afternoon developing——

Mr. Watson: If the Court please, the materiality—I propose to show that this witness——

The Court: Do not make any statement before this jury what you propose to put in. Let the jury determine. At the moment the objection is sustained.

Mr. Watson: May I ask the jury be taken [87] out?

(Jury admonished and excused until 10:00 o'clock the next morning. Recess at 5:00 o'clock until 10:00 o'clock, October 15th.)

Tuesday—October 15, 1957

(Defendants present with counsel and government counsel present. Presence of the jurors and alternate jurors stipulated.)

The Court: You may proceed.

Mr. Sage resumed the witness stand on continued

Cross-Examination

By Mr. Watson:

Q. Mr. Sage, you remember the people I named to you yesterday who were living with you at the Grande Court? A. Yes, I remember.

Q. Is it not a fact that you, with all those other

(Testimony of Ray L. Sage, Jr.)

people, Jerry Fritzell, Coite Gaither, Mr. Balzar and Mr. Farola, had a free-for-all fight the preceding Sunday, the 19th? A. No, sir.

Q. Isn't it true the North Las Vegas police department came to a room where you were physically present in the Grande Court and stopped such a fight on Sunday night? A. Not that I recall.

Mr. Watson: No further questions.

Cross-Examination

By Mr. Matteucci:

Q. As I understand, at the time this beating was supposed to take place, you were handcuffed, is that correct? [88]

A. Part of the time.

Q. Were your hands cuffed behind your back?

A. Yes, sir.

Q. In what position, like this? A. No, sir.

Q. Like this? A. Yes.

Q. Did you have any bruises on your shoulders or back, do you know?

A. I think there was some on the kidney; I am not sure about my back.

Q. During this supposed beating, you were knocked down a number of times, is that correct?

A. Yes, sir.

Mr. Mattuecci: That's all.

(Testimony of Ray L. Sage, Jr.)

Redirect Examination

By Mr. Babcock:

Q. Mr. Sage, what is your age?

A. Twenty-two.

Q. When were you born?

A. November 15, 1934.

Mr. Babcock: Nothing further.

(Witness excused.)

GEORGE F. CRISLER

a witness on behalf of the plaintiff, being duly sworn, testified as follows: [89]

Direct Examination

By Mr. Babcock:

Q. Will you state your name, please?

A. George F. Crisler.

Q. Where do you reside?

A. Henderson, Nevada.

Q. What is your occupation.

A. Chief of Police.

Q. For what city?

A. Henderson, Nevada.

Q. On February 27, 1956, what was your employment?

A. Chief of Police, Henderson, Nevada.

Q. On that date, Chief Crisler, did you have occasion to receive the admission of Ray Lewis Sage, Jr., at Henderson?

(Testimony of George F. Crisler.)

A. I personally did not, one of my officers did.

Q. You are here in response to a subpoena, are you not? A. That is correct.

Q. Requesting that you bring with you certain records relating to the booking of Ray Lewis Sage, Jr., at the Henderson police station, Henderson, Nevada, on or about February 27th?

A. That is correct.

Q. Do you have those records with you?

A. I have, sir.

Q. Could I see them?

A. Duplicate and the original.

Q. I hand you plaintiff's Exhibit 8 for identification and [90] ask if you can identify the proposed exhibit?

A. Yes, that is the form we use for the purpose of booking prisoners in our city jail.

Q. To what prisoner does this relate?

A. Ray Lewis Sage.

Q. What is the date of the booking?

A. Has 2-27-'56 at 3:08 p.m.

Q. Is that an official record of the City of Henderson police department?

A. That is correct.

Q. And that record is kept and maintained in the ordinary and regular course of the operations of the Henderson police department?

A. That is right.

Q. And by reason of your office as Chief of that police department, you are charged with the custody of those records, are you not?

(Testimony of George F. Crisler.)

A. That is right.

Mr. Babcock: I offer into evidence plaintiff's Exhibit 8 for identification.

Mr. Watson: On objection by Mr. Pool, your Honor.

Mr. Mattuecci: No objection, your Honor.

The Court: The offer will be received in evidence as government's Exhibit 8.

Q. Chief Crisler, I hand you what has been marked plaintiff's [91] Exhibit 9 for identification and ask if you can identify that proposed exhibit?

Yes, that is a card that we use in our file. It is G L identification card, showing that we have this prisoner in our custody in our city jail. It is a reference card.

Q. Is that an official record of the police department of the City of Henderson?

A. Well, not exactly, sir.

Q. Is that record made in the ordinary and regular course of the operations of the Henderson police department?

A. That is right.

Q. And is that maintained by you as such?

A. Yes.

Q. And by reason as to your office of Chief, you are charged with the custody and responsibility of records of the Henderson police department?

A. That is correct.

Mr. Babcock: I offer Exhibit 9 for identification evidence.

Mr. Watson: No objection, your Honor.

Mr. Mattuecci: I have a question on voir dire.

The Court: You may inquire.

(Testimony of George F. Crisler.)

Voir Dire Examination

By Mr. Mattuecci:

Q. Chief Crisler, on the bottom of this card it says, taken by North Las Vegas 2-28-56 p.m. Can you tell me what time [92] that is?

A. It could be an eight or a nine.

Mr. Matteucci: I have no other questions.

The Court: The offer will be received in evidence as government's No. 9.

Examination Resumed

By Mr. Babcock:

Q. Chief Crisler, I hand you plaintiff's Exhibit 9 in evidence. There are certain notations on this booking card. Who wrote those, if you know?

A. I believe that was written at the time by Don Richards. We had a different setup then than we do now. We had an integrated public safety department file for police work and the men were doing fine work. That has since been abandoned since that time. At that time Don Richards was the officer in charge of the station. He is now our fire chief.

Mr. Babcock: Your Honor, I would like to read to the jury——

Mr. Watson: If the Court please, I am going to object to the offer, what is written being identified that he believes it must have been Don Richards. If he knows of his own knowledge, that is another matter.

The Court: Witnesses have a habit of saying "I

(Testimony of George F. Crisler.)

believe" and "think." Do you know positively the person you have stated in regard to those additions to the card? [93]

A. To the best of my knowledge it is.

The Court: Very well; objection overruled.

Mr. Babcock: I would like to read briefly from this to the jury.

The Court: You may.

Mr. Babcock: On the top of this booking card is written: "No phone calls. No visitors. Maximum security. This one will run if possible." This is booking card of Ray Lewis Sage. Now here, "Arresting officer Carlson." Then there is receiving time by LMD and a figure appears to be either eight or nine p.m. You may inquire.

Mr. Watson: No questions.

Cross-Examination

By Mr. Matteucci:

Q. Chief Crisler, these are made out at the time the suspect was brought into the Henderson jail, is that correct?

A. As soon as possible, yes, sir.

Q. Will you look at this booking slip and in answer, "Are you in good health?" tell me what is on there please?

A. A check mark.

Q. What are the next words that appear after that?

A. "Nature of illness."

Q. What appears there?

A. Nothing.

Mr. Matteucci: That's all.

Witness excused. [94]

W. ALBERT STEWART, JR.

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name, please?

A. W. Albert Stewart, Jr.

Q. You have already been sworn in this matter?

A. Yes, sir.

Q. Where do you reside?

A. Las Vegas, Nevada.

Q. What is your occupation?

A. I am special agent for the Federal Bureau of Investigation.

Q. Where are you based?

A. Las Vegas, Nevada.

Q. How long have you been a special agent of the Federal Bureau of Investigation?

A. Fifteen years.

Q. How long have you been based in Las Vegas, Nevada?

A. Four and one-half years.

Q. Mr. Stewart, I hand you plaintiff's Exhibit 10 for identification, which purports to be a photograph, and I will ask you if you can identify that exhibit?

A. Yes, sir.

Q. What is it?

A. This is a photograph of gravel road known as U. S. Government Wells Access Road. The photograph was taken from the [95] entrance to the

(Testimony of W. Albert Stewart, Jr.)

road from the main highway, which is Highway 91, leading north.

Q. I hand you plaintiff's Exhibit 12 for identification and ask you if you can identify that exhibit?

A. Yes, sir. This is a photograph of the point of turn-off from U. S. Government Wells Access Road, which is approximately 1.8 miles from the turn-off on Highway 91.

Q. I hand you plaintiff's Exhibit 11 for identification and ask you if you can identify that photograph?

A. Yes, sir. This is a continuation of the U. S. Government Wells Access Road from the point 1.8 miles from Highway 91.

Q. I hand you plaintiff's Exhibit 13 and ask you if you can identify this photograph?

A. This is a photograph that is a further extension of the turn-off point to the entrance, showing the approximate position of the police car at the time of the alleged beating.

Mr. Watson: Your Honor please, the witness was not there when the police car allegedly was there. I don't see how he can testify where the police car was.

The Court: I think that is correct, counsel.

Q. Just identify the photograph.

A. It is a photograph of the further extension of the turn-off point 1.8 miles from Highway 91.

Q. I hand you plaintiff's Exhibit 14 and ask if you can identify this photograph? [96]

(Testimony of W. Albert Stewart, Jr.)

A. This is a photograph of the extension of the turn-off point 1.8 miles from Highway 91.

Q. I hand you plaintiff's Exhibit 15 for identification and ask you if you can identify this photograph.

A. This is a further photograph of the extension of the turn-off point 1.8 miles from Highway 91.

Q. I hand you plaintiff's Exhibit 16 for identification, which is a photograph, and ask you if you can identify that?

A. This is a photograph of the same spot as was in the previous photographs, with the exception that the camera was pointed in a westerly direction, when the previous photographs the camera was pointed in an easterly direction.

Q. I hand you plaintiff's Exhibit 17 for identification and ask you if you can identify that photograph?

A. This is another photograph of the extension of the turn-off point 1.8 miles from Highway 91.

Q. I hand you plaintiff's Exhibit 18 for identification and ask you if you can identify this photograph?

A. This is another photograph of the extension of the turn-off road 1.8 miles from Highway 91, with the camera pointed east.

Q. I hand you plaintiff's Exhibit 19 for identification and ask you if you can identify that photograph.

A. This is another photograph of the extension

(Testimony of W. Albert Stewart, Jr.)

of the turn-off point 1.8 miles from Highway 91, with the camera pointed north.

Q. I hand you plaintiff's Exhibit 20 for identification and [97] ask you if you can identify this photograph?

A. This is another photograph of the extension of the turn-off point 1.8 miles from Highway 91, with the camera pointed east.

Q. I hand you plaintiff's Exhibit 21 for identification and ask you if you can identify this photograph?

A. This is another photograph of the extension of the turn-off point 1.8 miles from Highway 91, with the camera pointed north.

Q. I hand you plaintiff's Exhibit 22 for identification and ask you if you can identify this photograph?

A. This is a photograph of the extension of the Government Wells Access Road at a point 5.8 miles from Highway 91.

Q. I hand you plaintiff's Exhibit 23 for identification and ask you if you can identify this photograph?

A. This is a photograph of a road turn-off west from gravel road at a point 5.8 miles from Highway 91.

Q. I hand you plaintiff's Exhibit 24 for identification and ask you if you can identify this photograph.

A. This is a photograph of the sign on the turn-

(Testimony of W. Albert Stewart, Jr.)

off road 5.8 miles from Highway 91 and at a point two-tenths of a mile west of the Government Wells Access Road, with the camera pointed south.

Q. I hand you plaintiff's Exhibit 25 for identification and ask you if you can identify this photograph?

A. This is a photograph of an area south of the turn-off road 5.8 miles from Highway 91, at a point where the road turns [98] from Government Wells Access Road. The camera is pointed south.

Q. Who took these photographs, plaintiff's Exhibits No. 10 for identification to and including plaintiff's Exhibit 25 for identification?

A. They were taken by myself and Special Agent Leslie B. Dieckman.

Q. Who was with you when these photographs were taken?

A. Special Agent Leslie Dieckman.

Q. Who is the person photographed that is in plaintiff's Exhibits 17, 18, 19, 20 for identification?

A. First appearing in the photograph is Special Agent L. B. Dieckman.

Q. There appears to be a legend written on the reverse side of each and every of the exhibits, plaintiff's 10 for identification through plaintiff's Exhibit No. 25 for identification. In whose handwriting are these respective legends?

A. My handwriting.

Q. Do these photographs, plaintiff's Exhibit 10 for identification, to and including No. 25 for identi-

(Testimony of W. Albert Stewart, Jr.)

fication, accurately portray the view contained therein?

Mr. Watson: Your Honor, we object. There is not sufficient foundation laid for the introduction in evidence at this time.

Mr. Babcock: I am not making the offer at this time.

The Court: There is no offer. Objection overruled. [99]

Mr. Babcock: Would you read the question please?

(Question read.)

A. Yes, sir.

Q. On what date were these photographs taken; that is, plaintiff's Exhibits 10 through 25 for identification?

A. June 21, 1956.

Mr. Babcock: You may inquire.

Mr. Watson: No questions.

Mr. Matteucci: No questions, your Honor.

(Witness excused.)

COITE M. GAITHER, JR.

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name, sir?

A. Coite M. Gaither, Jr.

Q. Where do you reside, Mr. Gaither?

A. I live at Apartment 2, Paradise Road.

(Testimony of Coite M. Gaither, Jr.)

Q. Las Vegas, Clark County, Nevada?

A. Yes, sir.

Q. How long have you made Las Vegas, Nevada, your home?

A. Since February 20th of this year.

Q. Mr. Gaither, on February 27, 1956, where was your permanent residence?

A. Apartment 15 Grande Court, North Las Vegas.

Q. Have you ever resided in North Carolina?

A. Yes, sir; I lived in Charlotte, North Carolina, that is where my family is.

Q. At or about this time of what State were you an inhabitant?

A. February 27, 1956, I lived here.

Q. You are a citizen of what country?

A. United States of America.

Q. What is your age?

A. Twenty-eight years old.

Q. When were you born?

A. April 5, 1929.

Q. Mr. Gaither, on or about February 27, 1956, were you picked up by a police officer or officers?

A. Two police officers.

Q. Do you know from what city?

A. North Las Vegas.

Q. And where were you picked up?

A. In my apartment, sir, Apartment 15, Grande Court, North Las Vegas.

Q. About what time of day was that, do you recall?

(Testimony of Coite M. Gaither, Jr.)

A. I would say between 10:30 and 11:30, sir.

Q. Under what circumstances were you picked up by those two officers?

A. That they did not tell me.

Q. What did they do?

A. Well, I was in my apartment. They walked in. [101]

Q. Do you know who the officers were?

A. No, sir; the only thing I know they had on police uniforms.

Q. Did you have a conversation?

A. They asked me where I was born.

Q. Just did you have a conversation, yes or no.

A. I wouldn't call it a conversation, sir.

Q. Then what happened after the two officers came to your residence?

A. Well, I was putting on a pair of shorts, I believe, sir, and they said, "Where are you going?"

Q. No conversation, just what did you do?

A. They made me sit in a chair.

Q. Then what did you do?

A. I sat in the chair until they took me up.

Q. How long was that?

A. Twenty to twenty-five minutes.

Q. Were you placed under arrest at that time?

A. They did not tell me I was under arrest.

Q. Then what happened?

A. They took me to the North Las Vegas police department.

Q. Do you recall about what time it was that you arrived there, if you know, can recall?

(Testimony of Coite M. Gaither, Jr.)

A. I would say eleven to eleven-thirty.

Q. What happened with you arrived at the North Las Vegas police department? [102]

A. Chief Pool questioned me.

Q. Where did they question you?

A. Chief Pool's office.

Q. Was any one else present other than those you have named, if you can recall?

A. There was either one or two ladies in the outer office there and there was, I think, a sergeant of the North Las Vegas police department.

Q. How long did this interrogation take?

A. About fifteen or twenty minutes.

Q. What was said and what was done during that interrogation?

A. They asked me if I want to come clean.

Q. Who asked you that, if you recall?

A. I think it was Chief Pool.

Q. Come clean about what?

A. They didn't say for what. They just asked me if I want to come clean and I said, "I don't know what you are talking about."

Q. What else was said or done during that interrogation?

A. They asked me about a couple of burglaries. I said, "I don't know what you are talking about," and then they says: "You didn't get home until 5:30 or 6:00 o'clock this morning." I said, "Well, I rode to town to see about some money my father was supposed to send me, with Ray Sage." There was two cars in front of the police station. They

(Testimony of Coite M. Gaither, Jr.)

say, "Sit in one, on the left-hand side." Before I had a chance to say anything. I [103] said, "Ray, you remember we rode to town early this morning to see about money my father was supposed to send me." I think he said yes, but I do not recall whether he said yes or not, and then I got in the Ford back seat.

Q. Why was it you were outside the police department at that time?

A. They carried me out there.

Q. Escorted you or carried you, or what?

A. They walked behind me.

Q. Who was that? A. Mr. Carlson.

Q. And for what reason, if you know?

A. They wanted to confront me with Sage, I would imagine because he didn't tell them that we had taken a ride to town.

Q. And then after this conversation with Sage, concerning the ride downtown, what next happened?

A. They put me in the back seat of the Ford.

Q. Who is they?

A. Well, not they; Mr. Carlson put me in the back seat.

Q. Who else, if any one, got in the car at that time? A. No one.

Q. Were you in that car alone?

A. He put the handcuffs on me when I got in the car.

Q. Who put handcuffs on you?

A. Mr. Carlson. [104]

Q. Were you handcuffed with your hands in

(Testimony of Coite M. Gaither, Jr.)

front or behind you? A. Behind me, sir.

Q. How long did you remain in the car?

A. I would say three to five minutes. It wasn't but a very few minutes.

Q. Then what next happened?

A. He was going to take me back inside the police department and I sat in Chief Pool's office.

Q. Did you have a conversation with any officers after you returned from the car?

A. No, sir. He just told——

Q. Who is "he"?

A. Mr. Carlson; he just told this officer to watch me, that's all.

Q. How long were you in the police station at that time?

A. I would say probably an hour or hour and a half.

Q. Were you interrogated during that period of time by any one? A. No, sir.

Q. Where were you seated?

A. Chief Pool's office.

Q. Then what next happened, after you were in the office about an hour and a half, as you testified?

A. Well, Chief Pool and Mr. Carlson come back and then they started asking me about the burglaries again. [105]

Q. What officers?

A. Chief Pool, Mr. Carlson.

Q. Will you state what the conversation was, or the interrogation was, and what you responded?

(Testimony of Coite M. Gaither, Jr.)

A. They said, "We have the car tracks," and he said, "We made an imprint of it." He said, "It is the same car." He said, "Come clean with us," and again I told him I didn't know what he is talking about.

Q. How long were you interrogated at that period?

A. Not very long. I say twenty or thirty minutes.

Q. What did the interrogation generally consist of?

A. He just wanted me to tell him that I committed the burglaries, sir.

Q. After that interrogation, what next happened?

A. They put me in the back seat of the car.

Q. Who is "they"?

A. Chief Pool, Mr. Carlson. Mr. Carlson sat in the back seat, Chief Pool was driving, I was in the back seat with Mr. Carlson. We went out to Nellis Boulevard——

Q. Were you under restraint at that time or not?

A. Do you mean did I have handcuffs on?

Q. Yes. A. Yes, sir.

Q. How were you handcuffed?

A. My hands behind me. [106]

Q. After you got into the car, what then happened?

A. They started out Nellis Boulevard. They went four or five miles on Nellis Boulevard, took a left turn on a dirt road at that time.

(Testimony of Coite M. Gaither, Jr.)

Q. Were you able to observe your travel, what road you were on?

A. Yes, sir. I remember the filling station where they took a left turn.

Q. And then after you took a left turn, where did you proceed?

A. We went about a mile, maybe a mile and a half, and we take a right, then we go about forty yards off the road, I would say.

Q. Were you able to observe your travel in this period of time?

A. Yes, sir; I was watching it.

Q. Then what happened, after you made this turn off and drove another forty yards, as you say?

A. Chief Pool got out of the car; Carlson got out of the car, pulled me out of the car.

Q. Who pulled you out of the car?

A. Carlson. He was in the back seat with me.

Q. Then what happened?

A. They asked me then did I want to come clean. I said, "I still don't know what you are talking about." Then they started striking on me with their fists.

Q. Who is they?

A. Chief Pool, Mr. Carlson. [107]

Q. Where were you at that time?

A. I was standing at the rear door of the Ford.

Q. Who struck you first, if you recall?

A. I am sorry, I don't recall.

Q. Will you explain the manner in which you were struck?

(Testimony of Coite M. Gaither, Jr.)

A. Well, I was hit in the stomach first. For a while I kept going up against the car and they kept hitting me in the stomach and finally I go down and then they give me a judo shot around the shoulder and neck.

Q. Who gave you a judo shot?

A. That I don't know, sir. While I was down I felt a couple of kicks right at the end of my spine and I was kicked in the chest a couple of times, I don't know how many times; I say two, maybe three, maybe four, I don't know.

Q. On the chest? A. Yes, sir.

Q. How many times were you struck to the area of your stomach, if you know, can recall?

A. That is pretty hard to say. I know it was quite a few times.

Q. Did you observe if Chief Pool struck you at or about that time?

A. Well, it was both of them at the same time.

Q. Did you say they both struck you?

A. I felt them both strike me and I seen them both strike me. [108]

Q. How long were you in this area, some forty yards off the dirt road?

A. About an hour and fifteen minutes, maybe an hour and a half.

Q. Was there a conversation there with the two officers at that time?

A. Yes; they all wanted me to come clean and I didn't say nothing, so they kept working on me.

Q. At any time while you were in physical cus-

(Testimony of Coite M. Gaither, Jr.)

tody of officers of the North Las Vegas police department on that day, did you offer any resistance?

A. I did not, sir.

Q. Did you fight back or engage in any physical altercation with any police officer of the North Las Vegas police department on that day?

A. No, sir; my hands were behind me.

Q. At the time of these beatings, were you handcuffed at all times?

A. My hands were behind my back with cuffs on them the whole time.

Q. How many times did you fall to the ground, if you recall?

A. Must have been six or eight times.

Q. During that period of time, did you make any admissions to either Officer Pool or Officer Carlson?

A. No, sir. I told them I didn't know nothing about it because I only got half of the sentences out. [109]

Q. What kind of language was used by Officer Pool and Officer Carlson?

A. I wouldn't say for sure, but I am fairly sure one of them said, "We will beat this punk till he coughs up."

Q. Were there any vulgarities used by either officer in the course of the interrogation?

Mr. Watson: If the Court please, I think he is leading the witness here and in the preceding question the witness answered he wasn't sure of any statement. I ask that this witness be sure or the answer be stricken.

(Testimony of Coite M. Gaither, Jr.)

The Court: Objection overruled. Proceed.

Q. Were there any vulgarities used by either of these officers during the beatings, as you have described it?

A. They called me a g. d. punk, son-of-a-bitch, something like that. That was used several times, as I recall.

Q. As I recall your testimony, you were there approximately an hour and a half, is that correct?

A. I would say between an hour and an hour and a half.

Q. Then what happened?

A. They put me back in the car and took me back to North Las Vegas.

Q. What route did you take?

A. The same way I come out.

Q. About what time of day was it that you returned to the North Las Vegas police [110] department?

A. I guess around 2:00 o'clock, two thirty.

Q. In the afternoon? A. Yes, sir.

Q. It was daylight? A. Yes, sir.

Q. And upon your arrival at the North Las Vegas police department, who was there?

A. Chief Pool and Mr. Carlson.

Q. Then what happened?

A. They took me inside and sat me down in the office where the calls come in, right in Chief Pool's office.

Q. How long were you seated there?

A. Half an hour, maybe forty-five minutes.

(Testimony of Coite M. Gaither, Jr.)

Q. Were you interrogated during that period of time by any one?

A. I wasn't interrogated. Captain Clifton made a statement to me.

Q. What did he say?

A. He says, "I wish you could run so I might shoot your God damn frame down."

Mr. Watson: If the Court please, it is not shown that Mr. Pool was present when this remark was made; I consider it highly prejudicial to Mr. Pool and ask it be stricken.

The Court: Have a better foundation.

Q. Who was present, if any one? [111]

A. A girl. I didn't know her name at the time but I just found out yesterday she was Chief Pool's wife.

Q. Who else was present?

A. Captain Clifton in that office.

Q. Chief Pool was not there, is that correct?

A. He was in his office, sir.

Q. But not in the room? A. No, sir.

Mr. Watson: Defendant Pool renews again his objection.

The Court: The objection will be sustained and the answers of this defendant relative to the statement made by Captain Clifton to him is stricken from the record and, ladies and gentlemen of the jury, the Court advises you when the Court directs anything be stricken from the record, you must consider it as though it had never been said and wipe

(Testimony of Coite M. Gaither, Jr.)

the entire recollection of it from your mind and not consider it.

Q. What next happened after you were seated in this room?

A. They took me to the Las Vegas police department.

Q. Who took you there?

(Jury admonished and morning recess taken at 11:00 until 11:15.)

11:15 A.M.

(Defendants present with their respective counsel and [112] government counsel present. Presence of the jurors and alternate juror stipulated.)

MR. GAITHER

resumes the witness stand on continued

Direct Examination

By Mr. Babcock:

Q. Mr. Gaither, at the point of the recess, I believe you had testified that you were then taken to the Las Vegas city jail, is that correct?

A. Yes, sir.

Q. Without relating any conversation, what happened to you there? A. They put me in jail.

Q. Who escorted you there?

A. One of the policemen, I guess. He had a uniform on. Mr. Carlson, as I recall.

(Testimony of Coite M. Gaither, Jr.)

Q. What time of day was that?

A. I would say three to three thirty, maybe four.

Q. How long did you remain in the Las Vegas city jail?

A. Well, around eight o'clock.

Q. Then what happened?

A. They carried me back to North Las Vegas.

Q. Who was they?

A. I think Carlson, patrolman by the name of Fisher and Mr. Al Ferguson.

Q. Where did you go then?

A. To the North Las Vegas police [113] department.

Q. At the time you were admitted to the Las Vegas city jail, did you make any complaint to any officer then on duty?

A. I asked the nurse for some pills. She said, "What's wrong?"

Q. Don't relate any conversation. What kind of medicine?

A. Any kind to give me some relief.

Q. Relief from what?

A. My stomach. I had ulcers.

Q. What kind of pills were given you?

A. She told me they were peanut barbitol.

Mr. Watson: The fact that the witness requested medication for stomach ulcers cannot prove anything in issue relative to the case. We ask it be stricken.

The Court: The answer may go out.

Q. What was your physical condition at the time

(Testimony of Coite M. Gaither, Jr.)

you were admitted to the Las Vegas city jail? How did you feel physically?

A. I felt like I never felt before.

Q. How was that?

A. I was hurting pretty bad.

Q. Where?

A. My stomach, my neck, my head and my shoulders.

Q. About eight o'clock, I believe your testimony is, that you were then taken back to the North Las Vegas police department, is that correct?

A. Yes, sir.

Q. What happened when you arrived there? Don't relate any [114] conversation, just tell me what happened. Where were you taken?

A. In Chief Pool's office.

Q. Did you have a conversation at that time with any one, yes or no? A. Yes, sir.

Q. Who was present?

A. Chief Pool, Clifton, Carlson, Barbara Farola, Frank Farola.

Q. What was said or done at that time?

A. He showed me the sack full of change.

Q. Who showed you that? A. Chief Pool.

Q. Continue.

A. He asked me did I recognize it. I said no. He asked me did I want to see these pieces of paper.

Q. Who asked you that? A. Chief Pool.

Q. What did you say?

A. He shoved the papers in front of me. I read the papers and I said, "What do you want to

(Testimony of Coite M. Gaither, Jr.)

know?" He said, "Tell me all about it." That is when I told him.

Q. What did you tell him?

A. I told him that we went into the Foodland Market and attempted to go into the Valley Market. I told him we also went into the Little Giant Market. That is all I told him at [115] that time.

Q. Then what was said or done at that time?

A. He said, "Tell me about the rest of them."

Q. Who is he? A. Chief Pool.

Q. What was your response?

A. I said, "There are no more."

Q. Did you have any further conversation with those people present you testified to?

A. He asked me where the slot machines were. I told him I would show him. So there was some more talk, I don't remember exactly what it was. He asked me—I remember this—he asked me where the crowbar was. I says, "It is out on a road in a field." So Clifton, I and Carlson, I am pretty sure, road out on that road and looked for that crowbar. We couldn't find the crowbar. They brought me back. Went back to the police station and Pool—I think it was Carlson—put me in a car and took me up on Sunrise Mountain, where I told them the slot machines were. We got the slot machines, picked up some change on the ground, come back into town to the police department.

Q. What happened when you then returned to the police department?

(Testimony of Coite M. Gaither, Jr.)

A. They let me alone for a few minutes. I told them I was sick.

Q. Where was this? [116]

A. When he took me for the crowbar.

Q. Did you get out of the car at any time on that road?

A. Yes, sir; when I up-heaved I got out of the car. I stuck my head out of the car. I didn't get all the way out of the car.

Q. The car was stopped for you?

A. Yes, sir; they stopped when they found out I was sick.

Q. Then you returned to the department, is that correct? A. Yes, sir.

Q. And what happened on your return? First of all, about what time of day or night was it?

A. Which time are you talking about?

Q. The time you came back after you were sick on the road. A. Probably nine thirty.

Q. About what time was it that you returned from your search for the slot machines?

A. Maybe ten or ten fifteen.

Q. Upon your return from your search for the slot machines, what is the next thing that happened, if you recall?

A. He said, "Are you ready to tell me?" I said, "I don't know any more to tell you." He said, "Do you want to go for another ride?" I said, "No, sir. Chief Pool, I have told you all I know." So he come back to me where the rest of the slot machines were. I think he said the 101 Club, the Rustic Inn and

(Testimony of Coite M. Gaither, Jr.)

about four or six other places. I said, "No, sir, I didn't [117] go to any of those places. He kept questioning me and questioning me, so I told him that we went in the Lincoln Market, which he did not know about. He didn't know about the Buzzers Market. I admitted I went into those two places. He said, "Tell me about the 101 Club and the Rustic Inn," maybe four, maybe six other places. I closed my mouth. I said, "Chief Pool, I don't know those places." He said, "You are lying to me." I said, "I am not lying, sir." Then again he asked me, he said, "You are sure you don't want to go on a ride?" I said, "Chief Pool, I have told you everything I know." So then we go across the street.

Q. Who is "we"?

A. Right now it was Chief Pool and Carlson, I believe that's all. We go into the club right on the corner, just about directly across the street from the North Las Vegas police department.

Q. What did you do there?

A. They had dinner and I had a couple of bowls of tomato soup. I went to the rest room and regurgitated again. I drank some water; they finished their dinner, paid the check, come back across the street to the police department. Then he kept questioning me about the other places.

Q. Who did?

A. Pool and Clifton. I told them both, I said, "I told you all I know." I said, "I don't know any more. What do you want [118] me to do?" They said, "Well, we want to know where the rest of the

(Testimony of Coite M. Gaither, Jr.)

slot machines are." I said, "I only know the ones that I took you to." I said, "The one we got out of the Little Giant Market is out in the city dump, I believe." So he said, "Well, we can't find it tonight, we will get it tomorrow." I said, "all right, sir." He said, "Now tell me where the rest of them are." I said, "There are no more." So it went on like that for maybe half an hour, maybe an hour, I don't know exactly. I wasn't feeling too well at the time.

Q. Why weren't you feeling too well at the time?

A. I was still sick. So he made out a confession.

Q. Who made out a confession?

A. He told us later what to write.

The Court: Who do you mean by "he," Chief Pool?

A. Yes, sir.

Q. Where did this take place?

A. They call it a courtroom, not in Pool's office. It was directly behind Pool's office.

Q. Who was present?

A. Pool was there and a lady that took the statement. I made one statement in there and I think I made one out in his office.

Q. The statement referred to what?

A. My confession, that I committed the burglaries.

Q. The burglaries that you have testified to?

A. Yes, sir. That was all. He wanted me to admit the rest of [119] the burglaries, so he could get them off his books, he says. I said, "Chief Pool, you can

(Testimony of Coite M. Gaither, Jr.)

beat me until the end of time, I am not going to admit anything I did not do." So I signed a statement that I did what I told them before. That was all.

Q. Were these statements in your handwriting, if you recall?

A. The lady took the statement.

Q. How did she take the statement?

A. If I am not mistaken, she took the statement in shorthand, typed it up and I signed it.

Q. After you signed the statement, what next happened?

A. They took me back to the Las Vegas police department.

Q. At any time thereafter did you return to the North Las Vegas police department?

A. Not after that. Yes, sir, the next morning. I didn't return after the next morning.

Q. What happened the following morning?

A. They took I and Sage——

Q. Now, don't relate any conversation, just what did you do with those others?

A. I took them to the city dump to try to find the slot machines. We walked to the city dump, I think twice. We didn't find the machine.

Q. Then what next happened?

A. They carried me back to the Las Vegas police department.

Q. Then what happened? [120]

A. Carried me back to the city jail, then the county jail.

(Testimony of Coite M. Gaither, Jr.)

Q. What county? A. Clark County, sir.

Q. Were you later charged with a felony?

A. Burglary, yes, sir.

Q. Did you enter a plea to that charge?

A. Guilty. I signed a confession.

Q. And then what happened to you?

A. Well, I stayed in jail a couple of days and somebody told somebody that——

Q. Don't relate any conversation. Were you thereafter incarcerated at the Nevada State prison?

A. Did I leave for the Nevada State prison?

Q. Yes, and did you serve time there?

A. I served ten months there.

Q. Could you identify Chief William Cecil Pool?

A. Yes, sir.

Q. Is he in this courtroom?

A. He is sitting right at the end of your table.

Q. Did you see him at a point approximately forty yards off a dirt road that you have previously testified to?

A. He was there with me, yes.

Mr. Babcock: You may inquire.

Cross-Examination

By Mr. Watson:

Q. Mr. Gaither, you say you were knocked down a number of [121] times by Detective Carlson and Chief Pool, is that right?

A. That is exactly right, sir.

Q. All this was going on say between one and two o'clock in the afternoon, is that right, your best guess?

(Testimony of Coite M. Gaither, Jr.)

A. That is the approximate time. I wouldn't swear to that.

Q. When you were knocked down, your hands cuffed behind you, by what means did you get up?

A. Mr. Carlson picked me up.

Q. Mr. Carlson picked you up?

A. That is right.

Q. And then one or the other then knocked you down again? A. Yes, sir.

Q. Now, when you were taken into the station that morning, Mr. Gaither, I believe you were wearing a dark blue suit, or a similar one that you have on, and a clean white shirt and a necktie, weren't you? A. I didn't have on a suit, sir.

Q. Did you have on a clean white shirt?

A. I think so, yes.

Q. A necktie? A. Yes.

Q. And you had some fairly nice dark blue pants that belonged to a suit, didn't you?

A. I had on these pants right here.

Q. The very pants you are wearing now? [122]

A. That's right.

Q. In other words, you were dressed as you are now, except for the coat, is that correct?

A. Yes; I think I had on a black coat.

Q. You had on a black coat?

A. I think, I am not sure.

Q. Now, after having been struck a number of times—by the way, none of these blows were above the neck—there were no blows on the face?

A. I wasn't hit in the face.

(Testimony of Coite M. Gaither, Jr.)

Q. All on the body? A. Yes, sir.

Q. After being struck a number of times and knocked down on the ground in the desert, it was sandy ground, wasn't it?

A. I would say it was gravel.

Q. Pardon?

A. I would say it had a lot of gravel.

Q. Was it regular southern Nevada desert soil, sand and dust and gravel?

A. Yes; it is out in the desert.

Q. After being knocked down a number of times and picked up each time by Mr. Carlson—

A. I wasn't picked up each time by Mr. Carlson. Sometimes I would only go down to one knee and I would come up by myself.

Q. And sometimes Mr. Carlson picked you [123] up? A. A couple of times, I believe.

Q. Did you have a lot of sand and dirt all over those nice blue pants you were wearing, white clean shirt, and your necktie?

A. I think I had quite a bit of dust on my pants.

Q. How about your clean white shirt?

A. It was messed up, I think.

Q. Was it dirty outside from having fallen on the ground?

A. I didn't go all the way on my face.

Q. You never did go completely down?

A. I never went straight out.

Q. Did you ever touch your face to the ground when you fell?

(Testimony of Coite M. Gaither, Jr.)

A. Sometimes I would go all the way down like this.

Q. Will you do that again, please?

A. Sometimes I go all the way down like this.

Q. But never all the way forward on your chest?

A. No, sir.

Q. And you were never knocked back?

A. I was knocked back against the car.

Q. But not back on the ground?

A. No, sir.

Q. And how about your necktie, did it stay fresh and clean?

A. It could have stayed fresh and clean, but I do not remember.

Q. Was your face dirty? [124]

A. Probably had some dust on it.

Q. Do you know? A. I don't recall, sir.

Q. You told us when you went into the station that you spent most of your time there in one of the two rooms they had in those days in the North Las Vegas police station, where the desk sergeant was, is that right? You saw the desk sergeant there, didn't you?

A. I stayed mostly in Chief Pool's office.

Q. Was Chief Pool's office closed off completely from the other room, or was it just a corner?

A. Chief Pool's desk was here, it run a long ways, and there was a desk here.

Q. Did any wall separate it from the place the sergeant was? It wasn't two separate rooms?

A. Yes, sir; it was two separate rooms.

(Testimony of Coite M. Gaither, Jr.)

Q. But part of the time you were in there with the desk sergeant, weren't you?

A. I wouldn't know part of the time.

Q. But specifically, didn't you go into that room after you got back from taking the trip which you told us about with Mr. Pool and Mr. Carlson?

A. I sat right there outside Chief Pool's room, in a chair.

Q. And right where the desk sergeant could see you, is that right? This is when you came back from your trip that you [125] told us about out on the desert.

A. If he was in there, he could see me.

Q. And then you went to the Las Vegas city jail that afternoon and that evening you told us that Mr. Carlson, Victor Carlson and Dan Fisher and Police Commissioner Al Ferguson came by and picked you up at the jail, is that right?

A. Yes, sir.

Q. And it was those three men that took you back to North Las Vegas?

A. Yes, sir; they took me back to North Las Vegas police department.

Q. And except for the time when you and Chief Pool and Detective Carlson took your trip up to Sunrise Mountain, Police Commissioner Ferguson was there in the office with you all the time, wasn't he? I will put it another way: He didn't just take you there and drop you off and go home, did he?

Q. You mean when he brought me from the Las Vegas city jail at night?

(Testimony of Coite M. Gaither, Jr.)

A. Yes, Mr. Gaither. He came on in the station, too, didn't he?

A. I wouldn't say for sure, but I think so.

Q. And although he didn't go with you to Sunrise Mountain, he did go with you over to the Oxford Club across the street, where you had your tomato soup, isn't that right?

A. All I remember is Chief Pool and Carlson. He could have been there, I don't remember. [126]

Q. Now, you have told us you know Mr. Ferguson? A. I didn't know him at that time.

Q. But you know now who he is? A. Yes.

Q. And you know he is one of the ones who picked you up at the jail? A. Yes, sir.

Q. Now, if Mr. Ferguson, the police commissioner, had spent the entire evening there at the station with you, except for the time you went out to Sunrise Mountain for the slot machines, don't you think you would remember it?

A. I would say in the condition I was in I wouldn't remember whether he was there or not. All I was answering Chief Pool's questions and Clifton's.

Q. Isn't it a fact, Mr. Gaither, that over at the Oxford Club, it was Mr. Ferguson who told you he was treating you and asked you to have a steak?

A. I think Chief Pool asked me to have a steak.

Q. Regardless of who asked you to have a steak, didn't you answer you couldn't hold anything on your stomach because you and Ray Sage had been

(Testimony of Coite M. Gaither, Jr.)

on a three- or four-day bat, as you expressed it?

Didn't you say that?

A. I could have said that.

Q. And you had been on a three- or four-day bat?

A. Yes; we had been drinking. [127]

Q. And you had stomach ulcers?

A. Yes; I have stomach ulcers.

Q. And that is the reason you were sick all the time, the reason you threw up on the way back from Sunrise Mountain, isn't it?

A. You are very wrong.

Q. All right, tell us.

A. Because that man and the other man beat me in my stomach, that is the reason I got sick.

The Court: At that point, who do you mean by that man and the other man?

A. Chief Pool and Mr. Carlson.

Q. Mr. Ferguson, over at the Oxford Club, even kidded you about how high you had been living, isn't that right, he joked about it?

A. He may have, I don't know.

Q. Now, as a result of this beating that Detective Carlson and Chief Pool gave you, as you say, did you make any complaint to Police Commissioner Ferguson when he came by to pick you up that evening?

A. I wasn't going to make a complaint with Carlson and Fisher there.

Q. Would you have otherwise?

A. If I thought I could have trusted that man, I might have.

(Testimony of Coite M. Gaither, Jr.)

Q. But you showed nobody at the North Las Vegas police station [128] any bruises that you had?

A. No, sir; I did not.

Q. You did not really have any bruises, did you?

A. I had a few right up in here.

Q. Heavy ones? A. Pretty heavy.

Q. Did you ever see a doctor about them?

A. No, sir; I didn't.

Q. What people saw the bruises that you had as a result of this beating?

A. Well, the boys in the county jail.

Q. Just the boys in the county jail, is that right? You didn't show your bruises, for instance, to the nurse that you got the stomach ulcer pills from?

A. No, sir; I didn't even tell her I had bruises. And I didn't know they were stomach ulcer pills. All she gave me was something for relief.

Q. You explained you had stomach ulcers when you asked for them?

A. That is what I told her. I said I got trouble with my stomach. I don't know whether I said ulcers or not.

Q. By the boys at the jail, you mean fellow prisoners?

A. Who were all there with me in jail.

Q. They are the only ones who ever saw these bruises you had on your chest, is that right? [129]

A. After a couple of days I think Lieutenant Roberts and Sheriff Leypoldt called me up in the office.

Q. Sheriff Leypoldt and Lieutenant Roberts?

(Testimony of Coite M. Gaither, Jr.)

A. Called both of us up.

Q. Did you show those gentlemen those bruises at that time?

A. They made me take off my shirt.

Q. Did you show them your bruises at that time? Did they see these bruises?

A. Yes, sir. They were going away but could still see them.

Q. Already going away two days later?

A. No, sir. I stayed in the Las Vegas city jail two or three days and then I was in the county jail two or three, maybe four days, maybe longer than that. I imagine they have it on the record, if you would like to check.

Q. How long was it after this beating that you told us about that you actually showed the sheriff your bruises?

A. That I can't say because I don't know; maybe five days, maybe seven days, I don't know.

Q. Isn't it true, Mr. Gaither, that you were shown this sack full of change in the presence of Commissioner Ferguson and it was at that time you said, "Well, you have the goods on me, I might as well tell you what I know"?

A. I don't know whether Mr. Ferguson was there or not. Chief Pool showed me the sack with the change in it and I said, "What do you [130] want?"

Q. And it was then that you said, "All right, you got me, what do you want?"

(Testimony of Coite M. Gaither, Jr.)

A. I don't know whether I said "you got me" or not. I said, "What do you want to know?"

Q. That extra two and one-half hours or more that you told us about interrogation and the conversation about Mr. Pool taking you for a ride again, that really didn't happen, did it?

A. If it didn't, I must be crazy, and I am a very sane man.

Q. That didn't really happen though?

A. That happened. If it didn't happen, I wouldn't tell you that.

Q. And the whole time you were at the North Las Vegas police station during that evening was at least three hours, is that right?

A. I don't know. I don't even know what time I left the city jail. I imagine around eight o'clock.

Q. And about what time did you get back?

A. I imagine eleven thirty to twelve, maybe one, maybe two.

Mr. Watson: That is all.

Cross-Examination

By Mr. Matteucci:

Q. You say you left the city jail about eight p.m., is that correct?

A. That is the time I would say. That is my imagination.

Q. That is the time you believe you left the city jail? A. That is the time, I believe. [131]

Q. And after you left you went to the North Las

(Testimony of Coite M. Gaither, Jr.)

Vegas police department and then Carlson and Captain Clifton took you out to look for a crowbar, is that correct?

A. Yes; they took me to look for the crowbar.

Q. That was about 9:30 or 10:00 o'clock?

A. It wasn't too long after I got there.

Q. Then when you came back Chief Pool is supposed to have threatened you, is that correct?

A. He kept asking me to tell him where the rest of the slot machines were and tell the other places I broke into.

Q. That was at least after 10:00 o'clock that evening, is that right?

A. I wouldn't say because I don't know.

Q. It was in the vicinity of ten p.m., anyway?

A. I would say it might be nine fifteen to nine thirty. I am not exactly sure.

Q. It was around nine fifteen or nine thirty?

A. That is my belief.

Q. Then a stenographer and you were placed in the back room of the police station and she dictated a statement to you, is that correct?

A. That is the way I remember, sir; Chief Pool dictated a statement—I think he kept asking me a couple of times, he said, "Is this right?" I said, "Yes."

Q. Then it was typed up and you signed it, is that right? [132]

A. I believe that is the way it was.

Q. You would say that was at least around ten p.m. that evening?

(Testimony of Coite M. Gaither, Jr.)

A. I would say it was around ten, I think.

Mr. Mattuecci: That's all.

(Jury admonished and noon recess taken at 12:00 noon.)

1:30 P.M.

(Defendants present with counsel and government counsel present. Presence of the jurors and alternate juror stipulated.)

Mr. Babcock: If your Honor please, the plaintiff at this time moves the Court for an order allowing the plaintiff to reopen with direct examination of this witness, for the limited purpose of his identification of certain proposed exhibits.

The Court: Any objection?

Mr. Watson: No objection, your Honor.

The Court: The request of the government is granted and it is allowed to reopen the case on direct examination of this witness for the special purpose only.

MR. GAITHER

resumes the witness stand on

Direct Examination

By Mr. Babcock:

Q. Mr. Gaither, I hand you plaintiff's Exhibit No. 10 through plaintiff's Exhibit 21 for identification. I will ask you to study those photographs and then I will ask you if you can [133] identify any of

(Testimony of Coite M. Gaither, Jr.)

those photographs. Have you had an opportunity to examine the photographs?

A. Yes; I think so.

Q. Would you hand to me any photographs that you can identify? You have handed me plaintiff's Exhibit 21 for identification. Can you identify this photograph? Yes or no.

A. Yes.

Q. What is it? A. It is a spot——

Mr. Watson: Your Honor, these photographs were first proposed by the agent of the Federal Bureau of Investigation. He testified the people present in those pictures, which were taken in June, were himself and another agent. How can this witness testify and identify these pictures?

The Court: He can't identify the pictures, but he can identify the object that is represented in the picture. You may proceed.

A. The right-hand side of this picture looks like the hill or mountain which they went behind after they took off the road.

Q. How many feet or yards did you go down?

A. When we turned off from Nellis Air Force Base?

Q. Yes. A. I would say around a mile.

Q. And you state a turn-off is represented in this picture. From what road is that? [134]

A. I don't know the name of the road, but it takes left off of Nellis Boulevard.

Q. Were you in or out of the automobile at this particular place represented in this proposed Exhibit 21? A. I was in and out.

(Testimony of Coite M. Gaither, Jr.)

Q. Are there any other proposed exhibits that have been handed you that you can identify?

A. This looks like practically the same one.

Q. You are referring to plaintiff's Exhibit No. 20?

A. Yes, sir.

Q. Do you recognize having been there before, in that immediate vicinity?

A. It looks like it to me, sir.

Q. When and under what circumstances?

A. When Chief Pool and Mr. Carlson took me out.

Q. Are there any other photographs that you can identify?

A. This looks like the road that you take a left off of Nellis Boulevard.

Q. Referring to plaintiff's Exhibit 19. Are there any other photographs?

A. I been here.

Q. Now, referring to plaintiff's Exhibit 18. What does that represent?

A. That looks like the exact place Chief Pool and Mr. Carlson took me. [135]

Q. Are there any other photographs that you can identify?

A. This is the exact place.

Q. You are referring to plaintiff's Exhibit 16. The exact place of what?

A. That Chief Pool and Carlson took me. This is the exact place.

Q. You are referring to plaintiff's Exhibit No. 15 for identification. The exact place of what?

A. Where Chief Pool and Carlson took me. This

(Testimony of Coite M. Gaither, Jr.)

looks like the same place. It is a little bit different picture.

Q. You are referring to plaintiff's Exhibit 14 for identification?

A. Yes. This is the road that leads off Nellis Air Force Boulevard.

Q. You are referring to plaintiff's Exhibit 10?

A. Yes, sir.

Q. Did you travel this road on February 27, 1956?

A. Yes, sir.

Q. In whose company?

A. Chief Pool and Mr. Carlson. This is the place.

Q. You are referring to plaintiff's Exhibit 13. Do you identify this proposed exhibit?

A. Yes, sir; I do.

Q. What is it?

A. That is the place where Chief Pool and Carlson took me. [136] I can't see the mountain in this picture here, but it looks like to me this is the road. The mountain should sit right over here, up a little bit. That is where you take a right, about forty yards off the highway.

Q. You are referring to plaintiff's Exhibit 12 for identification, is that right?

A. Yes, sir. This also looks like the road that you take a left off Nellis Air Force Boulevard.

Q. You are referring to plaintiff's Exhibit 11 for identification?

A. Yes, sir. This looks like the exact place I was beaten.

Q. You are referring to plaintiff's Exhibit 17

(Testimony of Coite M. Gaither, Jr.)

for identification, is that correct? A. Yes.

Mr. Babcock: You may inquire.

Cross-Examination

By Mr. Watson:

Mr. Watson: I understand, counsel, you are not now offering them?

Mr. Babcock: No.

Mr. Watson: No questions.

(Witness excused.)

VICTOR L. CARLSON

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name? [137]

A. Victor L. Carlson.

Q. Where do you reside?

A. 2504 No. Main Street.

Q. Where, what city?

A. North Las Vegas.

Q. How long have you been a resident of this community? A. Since 1954.

Q. On February 27, 1956, what was your occupation?

A. Detective sergeant, North Las Vegas Police Department.

(Testimony of Victor L. Carlson.)

Q. How long had you been associated with the North Las Vegas police department up to that date?

A. Since December 15, 1955.

Q. Do you know a person by the name of Ray Lewis Sage, Jr.?

A. I do.

Q. Did you have occasion to see him on or about February 27, 1956?

A. I did.

Q. Would you recite the circumstances of that meeting?

A. The early morning of February 27th we had several burglaries in North Las Vegas. I was called to the station early this morning. Lieutenant Miller and myself went to the Foodland Market and to the grocery store on East College, where burglaries had been committed. By the east side of the building of the College Market we saw the tire tracks of a car, a Ford car, knew where the car was parked, so we went to the Grande Court [138] on North Main Street, found the car, the tires were identical, so knowing the car, I knew that Sage had been in this car. I went to Apartment 15, knocked at the door and was told to come in. I opened the door. I saw the man, Jerry Fritzel. I identified myself as a detective from the North Las Vegas police department, and told him to get up and I would take him down to the station. I looked in the bedroom. Lying on the bed was a man by the name of Sage. I woke Sage up and told Sage to come to the police department and before Sage was getting up, I looked at his shoes and he had the same heel prints as I found at the market. I took Sage into the police depart-

(Testimony of Victor L. Carlson.)

ment in my car and Fritzel drove the old Ford to the police department. Danny Fisher——

Q. When you first saw Sage on that morning, how were you dressed?

A. How was I dressed?

Q. Yes. A. Plain clothes.

Q. What kind of a car did you escort or drive Sage down to the station?

A. 1955 light green Ford.

Q. Who was the owner of that automobile?

A. The City of North Las Vegas.

Q. What department of the city made use of that vehicle? A. Police department. [139]

Q. What time did you arrive with Sage at the North Las Vegas police department?

A. Approximately nine thirty in the morning.

Q. Upon arrival what did you do with him?

A. Placed him in the main room, in the old police department, at a table.

Q. Did you remain with him at that time?

A. I talked to Sage approximately twenty minutes.

Q. During this course of conversation was any one else present? A. Just Sage and myself.

Q. After your conversation with Sage of some twenty minutes, what next happened?

A. I went into the radio room where we had Fritzel placed.

Q. How long did that conversation take place?

A. Approximately twenty minutes.

Q. Then what did you do thereafter?

(Testimony of Victor L. Carlson.)

A. Then I believe Sergeant McKinney brought Gaither into the station. I remember the authorities brought a fellow by the name of Balzar and Chief Pool came into the station.

Q. At about that time. Where was Gaither placed at the time he was first brought into the station?

A. Approximately ten feet from Sage.

Q. What next happened?

A. I told Chief Pool of these burglaries and I had the car [140] outside and Chief Pool and I went out and looked at the old Ford, raised the trunk to see if the slot machines slipped into the trunk and there were loose dimes and two quarters in the trunk. We went back inside. Chief Pool told the boys——

Q. By boys?

A. Gaither and Sage. Told Gaither to go outside. Told Gaither to get in the police car No. 14. Gaither got into the right rear, Pool got into the left rear, and I got under the steering wheel.

Q. What happened thereafter?

A. Talked there a few minutes. Pool said, "Let's take a ride."

Q. Who did he say that to?

A. To me.

Q. What did you do?

A. So I backed out of the front of the old police department and drove north on Main Street, drove to a road by the Nellis Air Base, turned off Highway 91 on a gravel road, drove approximately a mile or a mile and a half to a big mound, turned off

(Testimony of Victor L. Carlson.)

this road back of this big mound, and Chief Pool told Gaither to get out of the car.

Q. Did he get out? A. Yes.

Q. While you were in your course of transportation, was there any conversation taking place?

A. Going out North Main Street Chief Pool was interrogating Gaither. [141]

Q. About what? A. About the burglaries.

Q. Do you recall what was said?

A. Yes. Do I have the Court's permission?

The Court: Go ahead.

A. He said, "Now, Mr. Son-of-a-Bitch, are you going to tell the truth about these burglaries? We know you have committed them. Now talk up and say so or take it the hard way." So we got back. This man told Gaither to get out of the car. Gaither got out on the left side of the car, with his back to the car, with Pool still interrogating him and struck Gaither in the midsection, struck Gaither on several occasions, struck him in the face and Gaither kept saying he didn't do it, he told the truth. We were gone approximately forty-five minutes to an hour and we came back the same route that we took to the police station and put Gaither inside.

Q. While you were at the mound, or this place where you eventually came to a halt by this mound that you spoke of, did you observe Chief Pool strike Gaither? A. I don't remember.

Q. Did you observe Chief Pool strike Coite Gaither? A. Yes.

Q. How many times did he strike him?

(Testimony of Victor L. Carlson.)

A. Several times.

Q. Did you strike him? [142]

A. Yes. Chief Pool struck him several times and Chief Pool told me, "Vic, you take over," which I struck Gaither and approximately slapped him six times.

Q. Where? A. On the face.

Q. Mr. Carlson, I hand you plaintiff's Exhibits Nos. 10 through and including plaintiff's Exhibit 21 for identification, and ask if you can identify any of these photographs? Inviting your attention to plaintiff's Exhibit 13 for identification, can you identify that particular proposed exhibit?

A. Yes.

Q. What is it?

A. This is the mound we drove back of on this gravel road up a mile or mile and a half west of Highway 91.

Q. Did you park your automobile at that particular location?

A. Yes; we were around the back.

Q. Showing you plaintiff's Exhibit 15, can you identify that photograph?

A. Yes; this is the mound.

Q. Showing you plaintiff's Exhibit 19 for identification, can you identify that photograph? If you can, say so; if you can't, please advise us.

A. I don't recognize that.

Q. Showing you plaintiff's Exhibit 21, can you identify that proposed exhibit? [143]

(Testimony of Victor L. Carlson.)

A. Yes, this picture is just of the back of the mound. Parked between that, right in back here.

Q. Showing you plaintiff's Exhibit 17, I will ask you if you can identify that proposed exhibit?

A. Yes, sir; that is back of the mound.

Q. Showing you plaintiff's Exhibit No. 12 for identification, I will ask you if you can identify that proposed exhibit?

A. This is the road leading off the highway toward the mound.

Q. Showing you plaintiff's Exhibit 16, I will ask if you can identify that proposed exhibit?

A. This is the back of the mound.

Q. Showing you this proposed Exhibit 14, I will ask if you can identify that proposed exhibit?

A. I do not recognize that.

Q. Showing you plaintiff's Exhibit 20 for identification, I will ask you if you can identify that photograph?

A. Yes; this is the back of the mound also.

Q. Showing you plaintiff's Exhibit 18, I will ask if you can identify that photograph?

A. Yes; this is back of the mound.

Q. Showing you plaintiff's Exhibit 10, I will ask you if you can identify that photograph?

A. This is the gravel road.

Q. Gravel road from where?

A. Nellis Air Force Highway 91. This is the road from Highway [144] 91 running west that we drove up.

(Testimony of Victor L. Carlson.)

Q. And showing you plaintiff's Exhibit 11, I will ask you if you can identify that proposed exhibit?

A. Yes; this here is near the mound, this is the gravel near the mound.

Q. Mr. Carlson, how long would you say that you were in this area of the mound?

A. Approximately thirty minutes.

Q. And during that period of time was Gaither being interrogated by any one?

A. I didn't hear you.

Q. During this one-half hour period was Gaither being interrogated by any one?

A. Yes, by Chief Pool.

Q. Do you recall what was said by either Chief Pool or by Gaither at that time?

A. Chief Pool—may I repeat this?

The Court: Go ahead.

A. Chief Pool said, "Now, you son-of-a-bitch, are you going to tell the truth, or are you going to take it the hard way?"

Q. What did Gaither say, if you recall?

A. Gaither said, "I told you the truth." He said, "We didn't do any of those jobs."

Q. During this thirty minute period of time that you were at the area of the mound, were any admissions made by Gaither? [145]

A. No.

Q. At any time did the force of the blows to Gaither cause him to fall to the ground?

A. Yes.

Q. About how many times?

A. Approximately three times.

(Testimony of Victor L. Carlson.)

Q. And then after the thirty minutes, I believe your testimony was that you returned to the North Las Vegas police department? A. Yes.

Q. What road did you return by?

A. The same road.

Q. And upon your arrival at the police department what happened?

A. We took Gaither back inside the police department and Chief Pool told Sage to come outside, with Sage in the same position—Sage got in the right rear, Pool the left rear—Sage in the left rear, Pool the right rear, and I under the steering wheel.

Q. Then what was said or done after you were in the car?

A. Pool was interrogating Sage on these burglary jobs, which Sage denied, said he wasn't even in the car and Pool got Gaither back outside and he said he was in the car.

Q. Do you recall what the conversation was when he brought Gaither out to Sage?

A. Gaither verified that Sage was in the car the night before.

Q. Do you recall under what [146] circumstances? A. The burglaries.

Q. Then what happened?

A. Well, Clifton came from the direction of the drugstore and Pool told Eddie to get into the car.

Q. What car? A. The police car.

Q. Did he get in?

A. Eddie got in the right front.

Q. Was Sage in the car at that time?

(Testimony of Victor L. Carlson.)

A. Yes.

Q. And he was seated where?

A. Left rear.

Q. Who else got in car No. 14 at that time?

A. Chief Pool was in the right rear.

Q. Were you in the car?

A. I was under the steering wheel.

Q. Then what happened?

A. I was told to take a drive.

Q. And did you drive? A. I did.

Q. Where?

A. Drove north on Main Street approximately College Avenue and North Main and made a right turn. Chief Pool said, "Get on the floor boards."

Q. He was talking to whom? [147]

A. To Sage. Told Sage to get on the floor boards. I had the front seat pushed back. There wasn't much room and Sage attempted and had a hard time to do so. Pool pulled his 45 automatic and said, "I told you to get on the floor boards, you son-of-a-bitch, now get down there." Sage had a hard time getting on the floor boards, but he did. We drove north on Main Street to this gravel road, turned off this gravel road approximately a mile or a mile and a half, and then back of this mound.

Q. Is this the same location you had driven to with Gaither?

A. Same location. Pool told Sage to get out of the car. Sage got out the rear seat and stood with his back against the right rear fender and Pool told Eddie, "All right, work him over."

(Testimony of Victor L. Carlson.)

Q. Eddie who?

A. Clifton. So Eddie took his shirt off.

Q. Whose shirt?

A. Eddie Clifton took his shirt off.

Q. Clifton's shirt or Sage's shirt?

A. He took his shirt off, walked over to Sage and—do I have the Court's permission—he walked up to Sage and hit Sage in the jaw here and said, "Now, Mr. Son-of-a-Bitch, are you going to tell the truth," and Sage reeled and leaned over the back of the police car and fell down back of the police car. Eddie Clifton went back to the police car and got his five-cell flashlight out, with about a four-inch head on it and he beat Sage [148] in the mid-section with the flashlight and Sage begged him not to strike him any more. Sage would fall down on the ground and Pool come up and kicked Sage in the back, ribs, wherever he could kick him. Chief Pool ordered me to put my handcuffs on Sage and his hands to his back. I put my handcuffs on but his wrist was so big they slipped off. Then Eddie continued to beat Sage.

Q. About how many times would you approximate that Sage was struck with the small end of the flashlight before you put the handcuffs on him?

A. Probably sixty or seventy times.

Q. After you put the handcuffs on him, what next happened?

A. He continued to beat him.

Q. Who continued to beat him?

A. Eddie Clifton with the flashlight. Sage would

(Testimony of Victor L. Carlson.)

fall down and he had sand in his eyes, sand in his mouth, begging him to not beat him, he didn't do the job, he said he told them the truth. At that time I saw an airplane had left Nellis Air Force Base, flying low. I told Chief Pool that the pilot could see him, so Chief Pool told him to get back into the car, which we all got in in the same position, got back out onto the gravel road, turned right, went in a westerly direction for approximately three miles, I would say, got on another gravel road that goes past the junk road and Pool told me to turn up the road. I turned up this road. We stopped at a knoll. [149]

Q. How far would you say the knoll was from this road you were travelling?

A. Approximately about four blocks.

Q. Then what happened when you got to the knoll?

A. So Chief Pool told Sage to get out of the car and Sage did and Chief Pool took Sage down in a gulley and there was an old couch down there. Chief Pool and Sage sat on it. Pool was interrogating him.

Q. About what?

A. About these burglaries, that he wasn't telling the truth and he wanted to take it the hard way and Eddie Clifton said to me, "Vic, we had better go down there. Pool is going to kill that son-of-a-bitch," so we got out of the police car, walked down this gulley and Chief Pool, he said, "Eddie, you take over." Eddie Clifton pulled his forty-five automatic and put it at Sage's right temple and

(Testimony of Victor L. Carlson.)

he said, "Now, Mr. Son-of-a-Bitch, are you going to tell the truth or I am going to blow your brains out." Sage repeatedly said he told the truth and they weren't involved in any burglary job. We left the scene and came back to the police station, drove up the alley.

Q. Before you come to that point, how long would you estimate you were at the area of the knoll on your second stop?

A. Approximately forty-five minutes.

Q. How did you return to the North Las Vegas police department? [150]

A. Came back this gravel road, which I don't believe there is a name to it, drove past the junk yard and came to West College Avenue, coming into North Las Vegas across Main Street to the first alley and came up the alley, drove to the back to the police department.

Q. Did you observe, on your return trip whether or not Sage was suffering physically?

A. Yes; he appeared to be hurt in the mid-section.

Q. At the time of the interrogation that you have referred to, first as to the mound and secondly as to the knoll and the gulley, were any admissions made by Sage? A. No.

Q. You then returned through the alley to the North Las Vegas police department?

A. Yes; to the rear of it.

Q. What did you do upon your arrival at that time? A. Chief Pool said—

(Testimony of Victor L. Carlson.)

Q. Let me ask what time of day was it?

A. That was approximately around 3:00 o'clock.

Q. Then what happened?

A. Chief Pool said, "You guys take Sage to the Henderson jail.

Q. He was referring to whom?

A. Eddie Clifton and myself. He said, "I will call Henderson and make arrangements." So we took Sage to the Henderson jail and booked him in there. [151]

Q. What did you do at the Henderson police department?

A. We booked Sage into Henderson police department on investigation of burglary and returned to North Las Vegas.

Q. Showing you plaintiff's Exhibit 9 in evidence, which is the booking card of the Henderson city police, there appears certain notations: "No phone calls, no visitors, maximum security. This one will run if possible." Do you recall either you or Officer Clifton making a request of that nature to the booking officer at the Henderson police department?

A. Officer Clifton.

Q. He made that request? A. Yes.

Q. How long were you at the Henderson police department or their city jail?

A. Approximately thirty minutes, forty-five minutes.

Q. Did you observe if any complaint was made by Sage to the Henderson police department at the time you were there? A. No.

(Testimony of Victor L. Carlson.)

Q. Were you with Sage, you and Clifton with Sage, all of this thirty minutes?

A. Yes; just about.

Q. Then what did you do?

A. We returned to the North Las Vegas police department.

Q. And what did you do upon your arrival?

A. Upon arrival at the North Las Vegas police department we [151-A] started making reports.

Q. What kind of reports?

A. Report of this investigation of burglary.

Q. Was any report made by either you or Clifton or Chief Pool concerning the matter of any injury to Sage at that time?

A. That following evening, the next day, when we learned that the grand jury was going to investigate the North Las Vegas police department.

Q. Then returning back to February 27th, when you arrived at the North Las Vegas police department from Henderson, what then did you do with reference to these police reports?

A. From the Henderson jail?

A. No; when you returned back to the North Las Vegas police department, you stated that you made certain reports. What did these reports relate to specifically, if you recall?

A. Just the investigation of the burglary at this particular time.

Q. Was any report made by you, and if you know, Clifton, concerning either Sage or Gaither?

A. We was ordered by Pool to make a report

(Testimony of Victor L. Carlson.)

that we drove out east College Avenue to Nellis Boulevard, turned right on Nellis approximately five or six blocks, Sage attempted to jump out of the police car, that is how he got the injuries.

Q. When was that told to you by Chief Pool?

A. Right after returning to the North Las Vegas police department. [152]

Q. Who was present when that statement was made?

A. Eddie Clifton.

Q. And yourself?

A. Yes.

Q. At any time during the transportation of Sage, did he make an attempt to jump out of your police vehicle?

A. No; he did not.

Q. Did you make such a report at the request and order of Chief Pool?

A. I did.

Q. What did you do with that report?

A. I had to testify to that report to the County Grand Jury.

Q. I am speaking of this day, what did you do with it?

A. Chief Pool got it.

Q. Was it made a matter of the official police records of the North Las Vegas police department, do you know?

A. Yes.

Q. Who signed that report, if you know?

A. I signed my copy. He signed his.

Q. Pardon?

A. I signed mine, Eddie Clifton signed his copy.

Q. After you had submitted that report, what did you next do?

A. Just went on routine police matters, I guess.

Q. When was the next time that you saw [153]

(Testimony of Victor L. Carlson.)

Sage? A. It was the next evening.

Q. Where did you see him?

A. In the Henderson police department.

Q. About what time of day, rather the hour of the day? A. About 8:00 p.m.

Q. What was your reason for being there?

A. To bring him back to the North Las Vegas police department.

Q. Who was present with you?

A. Eddie Clifton.

Q. What did you do with Sage?

A. Brought him to the North Las Vegas police department. After I had showed Gaither a sack containing the money from these burglaries, he admitted it, then he made a confession. I showed Sage the confession and Sage admitted it.

Q. Admitted what? A. The burglary.

Q. Was Sage interrogated upon his return from the Henderson city jail? A. Yes.

Q. Where was he interrogated?

A. In front of Chief Pool's desk.

Q. Who was present?

A. Chief Pool and myself.

Q. Any one else, if you recall?

A. That's all I recall. [154]

Q. How long did you interrogate, you and Chief Pool, interrogate Sage at that time?

A. Approximately thirty minutes, showed him the evidence and he made a confession.

Q. Do you recall if a statement was made by Sage, that is, a written statement, at that time?

(Testimony of Victor L. Carlson.)

A. I believe there was.

Q. Do you recall whether it was typewritten or in the handwriting of Sage?

A. I believe it was given to the chief by Ramona. She typewrote it out.

Q. After that was done, about what time of night was it? A. Approximately 10:00 p.m.

Q. What next happened as it relates to Sage?

A. Then Chief Pool took Sage into the courtroom and told Sage that the Grand Jury was going to probe the police department.

Q. Who was present?

A. Myself, Al Ferguson, Chief Pool and Sage.

Q. What was said?

A. Chief Pool told Sage, asked Sage why he had given a statement to Dr. French at Henderson. Sage said he was sorry. Chief Pool told him, he said, "You know we are going to get in a lot of trouble" and if he couldn't write the statement. Sage was agreeable to write the statement contradicting Dr. French. I got paper and pencil and Sage started writing this [155] statement over and he was having a hard time and Chief Pool would put words in his mouth, what to put on the paper.

Q. This statement was in the handwriting of Sage? A. Sage, yes.

Q. Do you recall how many pages it was?

A. I don't know. I didn't count them. It was quite a few.

Q. Do you know what happened to that statement?

(Testimony of Victor L. Carlson.)

A. That statement was testified to at the grand jury.

Q. No, what happened to that statement on that day, at that time?

A. Went in Chief Pool's custody.

Q. What did Sage say, if he said so orally, as to the manner in which he received certain bruises on his body and injuries?

A. I don't recall him making any statement at that time.

Q. It was all in writing, is that correct?

A. Yes.

Q. After that statement was taken of Sage, then what next happened?

A. Al Ferguson was present at the statement being taken. Chief Pool had Sage open up his shirt and show Al these bruises on his body and told Al Ferguson about the grand jury probe. He said Al should go over to the grand jury, due to the fact he was police commissioner, and uphold the police department.

Q. Then what happened? This conversation, I take it, took place in the courtroom behind Pool's office, is that right? [156]

Was anything further said, if you recall?

A. I don't recall anything.

Q. Then what happened?

A. Then they didn't know what to do with Sage, with these bruises, didn't want to take him back to Henderson.

Q. Who is they?

(Testimony of Victor L. Carlson.)

A. Chief Pool, and Eddie Clifton, myself and Dan Fisher was there at that time, and Dan Fisher said, "Maybe we can get him into the army stockade at Nellis," which was rejected.

Q. By whom?

A. By Chief Pool. Couldn't take him back to Henderson, so then they put Sage in the Las Vegas police department jail.

Q. Do we understand at that time there were no jailing facilities at North Las Vegas, is that correct?

A. That's right.

Q. Who took him to the Las Vegas city jail?

A. I and Danny Fisher.

Q. About what time of day or night was that?

A. Getting close to midnight.

Q. That was on the evening of February 28th?

A. Yes.

Q. What did you do at the time of booking Sage into the Las Vegas police department?

A. Well, he told us——

Q. Not conversation—just what did you do? [157]

A. We booked him in for burglary, then we returned to North Las Vegas.

Q. Did you see Chief Pool or Captain Clifton upon your return to the North Las Vegas police department?

A. Yes.

Q. Did you have a conversation with either one of them?

A. Not that I recall at that particular time.

Q. Now, going back to Gaither. You testified, I believe, that you brought him back to the North Las

(Testimony of Victor L. Carlson.)

Vegas police department? A. Yes.

Q. And what did you do with him after he was brought back?

A. After we brought Gaither, he admitted the burglary. Gaither stayed around the police department there for approximately two hours and Al Ferguson, Chief Pool, myself and Gaither went over to the Oxford Club to eat. We wanted to give Gaither anything he wanted to eat, but he chose tomato soup, said he had a bad case of ulcers.

Q. What time of night was that?

A. That was approximately 11:00 o'clock.

Q. On what date, February 27th?

A. February 27th.

Q. Did you have any conversation with either Pool or Clifton at the Oxford restaurant, concerning either Gaither or Sage?

A. Not that I recall.

Q. Do you recall whether or not Gaither became ill while at [158] the restaurant?

A. He said he wasn't feeling well, that is the reason he had tomato soup. He said if he ate anything heavy it would come up.

Q. Then after taking food, what did you then do next?

A. We returned to the station.

Q. With Gaither?

A. Yes, and Gaither was taken to the Las Vegas jail.

Q. When was the next time you saw Gaither?

A. I don't remember the exact date, but it was

(Testimony of Victor L. Carlson.)

when Gaither and Sage and another man were arranged before the justice on burglary.

Q. Do you remember when that was accomplished? A. In the afternoon.

Q. What date, if you know?

A. I don't recall the exact date.

Q. Did Gaither give a statement either before or after having food at the Oxford Club?

A. Not that I know of.

Q. A written statement?

A. I don't recall a statement.

Q. When was the last time, within this period of time, February and March, 1956, did you see either Sage or Gaither?

A. I was told by Eddie Clifton in March, approximately the 3rd or 4th, after learning the County grand jury was going to [157] probe the North Las Vegas Police Department through the Federal Bureau of Investigation, to go out to the county jail and talk to Gaither and to see what I could learn. I went to the sheriff's office and told him I wanted to see Gaither. I had to wait for two jailers to get in. They went down to the jail and brought Gaither out. The minute Gaither saw me he turned around and went back.

Q. Did you have a conversation with Gaither at that time? A. He refused to talk to me.

Q. Was that the last time you saw Gaither in that period of time? A. Yes.

Q. When was the last time you saw Sage through the month of February or March of 1956?

(Testimony of Victor L. Carlson.)

A. The last time I saw Sage was when I took him to the Las Vegas jail or taken him over for arraignment.

Q. To the justice's court? A. Yes.

Q. At about this time did you have any conversations with either Chief Pool or Capt. Clifton concerning the matter of either Sage or Gaither?

A. Chief Pool had to go to Texas. His father was sick, so he went to Huntsville, Texas.

Q. About when was this, do you recall?

A. That was the first part of March. [160]

Q. 1956?

A. Yes. The County grand jury was probing the North Las Vegas police department. Eddie Clifton and I went over to the Bonanza Club and used the private phone in the manager's office and we called Texas and talked to Pool.

Q. Did you talk to him? A. Yes.

Q. Who was present at the time you had this conversation?

A. Eddie, when I talked to him and then I told Chief Pool the County grand jury was going to probe the North Las Vegas Police Department, so Chief Pool said, "Well, I will return to North Las Vegas."

Q. Chief Pool told you that? A. Yes.

Q. Did he tell you anything else?

A. That was all at present. He said, "Just hold tight."

Q. When next did you see Chief Pool?

(Testimony of Victor L. Carlson.)

A. The next morning I came to the police department and Ramona showed——

Q. Who is Ramona?

A. Chief Pool's wife, stenographer at the police department. She told me that Chief Pool——

Q. Just a minute. Don't relate any conversation not in the presence of either Pool or Clifton. You saw Ramona? A. Yes. [161]

Q. When did you next see Chief Pool?

A. Los Angeles Airport.

Q. On what date?

A. I don't recall the exact date. First part of March, 1956.

Q. How did you travel to the airport at Los Angeles? A. Police car No. 10.

Mr. Watson: Your Honor, it seems to me we are going very far afield. I don't see the relevancy and I object on that ground.

The Court: It is pretty soft ground. Can you be more specific?

Mr. Watson: Yes, your Honor. It doesn't appear the last twenty questions here counsel has led up to anything that would be material or relevant to the case. The circumstances alleged in the indictment are now past and we have gone on to things that happened way into the following week.

The Court: Upon your legal point, your objection is irrelevancy. Overruled.

Q. You testified you travelled to the Las Vegas airport in police car No. 10? A. Yes.

Q. Who was the owner of the police car?

(Testimony of Victor L. Carlson.)

A. The City of North Las Vegas.

Q. On whose instruction did you go to Los Angeles?

A. Chief Pool called Ramona and she told me Chief Pool wanted us to meet him at the airport. [162]

Q. Who travelled with you?

A. Eddie Clifton, Wilbur McManch.

Q. What time of day did you leave on your trip?

A. We left approximately eleven a.m.

Q. What time did you arrive?

A. Approximately four in the afternoon.

Q. Did you meet Chief Pool at the airport?

A. Yes.

Q. Was any one with him?

A. He was by himself.

Q. Did you have a conversation with him at that time?

A. Just on returning to North Las Vegas.

Q. Who returned to North Las Vegas?

A. Chief Pool, myself, Eddie Clifton, Wilbur McManch.

Q. Did a conversation take place during the course of your travel?

A. Yes, the County grand jury was probing our department and Chief Pool informed Eddie and myself we had made these statements he had jumped out of the car, we had to stick to them. Chief Pool said, "The first one that turns around will find himself on the desert."

(Testimony of Victor L. Carlson.)

Q. To whom did he direct that remark?

A. It was to me. I recall he looked at me.

The Court: What do you mean by "turn around"? Do you mean the first one who reversed his statement [163] or position as to Sage jumping out of the car?

A. Yes.

The Court: To the grand jury?

A. Yes.

Q. What time did you arrive back in North Las Vegas from the airport?

A. We stopped at San Bernardino. Approximately one o'clock in the morning.

Q. The following morning? A. Yes.

Q. Do you know, Mr. Carlson, if that particular trip in police car No. 10 was logged by the North Las Vegas police department?

A. No, it was not.

Q. Why wasn't it?

A. Nobody knew where we were going.

Q. Did Chief Pool tell you to meet him?

A. Chief Pool wanted to be met.

Q. Did he tell you that?

A. He didn't tell me at all. Ramona told me that.

Q. Upon your arrival at North Las Vegas the following morning at one o'clock, what happened if anything?

A. I don't recall anything occurring at that particular time.

Q. When next did you have a conversation with

(Testimony of Victor L. Carlson.)

either Chief [164] Pool or Capt. Clifton with reference to either Sage or Gaither?

A. It was the next morning. The County grand jury was getting hot; they had probed us pretty well. Chief Pool with Eddie was driving the car up himself, I just came into the station and they drove up. Chief Pool slipped over, he said, "Vic, you drive," and he said, "Go out to the Los Angeles highway."

Q. Who was in the car at that time?

A. Myself, Chief Pool and Eddie Clifton. I headed out the Los Angeles highway and Chief Pool said, "We have to get Eddie Clifton out of town" so we took Eddie Clifton to Baker, California. We left him off at Baker, California. Pool said he would be indicted by the grand jury and Eddie said when he got indicted and put in jail, he would come back and get him out. He said also when he got out of Baker, and directly looking at me, if anybody turned him around, they would find himself out on the desert.

Q. That remark was directed to whom?

A. To me.

Q. So what next happened at Baker?

A. Chief Pool and I returned.

Q. Where was Clifton to go, if you know?

A. He had a friend over in Los Angeles named Phil Pervano, lived in a trailer camp. We came back——

Q. Was any money given to Clifton at that time? [165]

(Testimony of Victor L. Carlson.)

A. Yes, Chief Pool gave him twenty dollars.

Q. For what purpose?

A. To get the bus on in to Los Angeles.

Q. While you were present did Chief Pool give any direction to Clifton as to what he should do when he arrived in Los Angeles?

A. To all of us he said the grand jury would be out to get him.

Q. Then did you return to North Las Vegas?

A. Yes.

Q. With whom? A. Chief Pool.

Q. Did you have any conversation with Chief Pool during the course of that transportation?

A. Just about we were getting to Baker we heard the sheriff's car, sheriff's radio broadcast from one of the units and evidently asked if he served the subpoena and he said no. Coming back we were talking about getting our subpoena and the grand jury.

Q. How long did that trip down and back take?

A. About an hour and ten or fifteen minutes.

Q. Each way? A. No, round trip.

Q. Do you know if that particular trip was officially logged at the North Las Vegas police department? [166] A. No, it wasn't.

Q. Upon your arrival at North Las Vegas, did you thereafter have a conversation with either Chief Pool or Capt. Clifton, relating to either Sage or Gaither?

A. The only conversation it come up we would be testifying before the grand jury.

Q. Mr. Carlson, I hand you plaintiff's Exhibits

(Testimony of Victor L. Carlson.)

No. 22 to and including No. 25 for identification, and ask if you can identify those proposed exhibits?

A. This is the road coming up out of the bank there, and this road turns up going to the gulley.

Q. You are referring to plaintiff's Exhibit 22 for identification, is that correct?

A. Yes. This is the road leading up approximately four blocks where we stopped the car.

Q. You are referring to plaintiff's Exhibit 23 for identification, is that correct?

A. Yes, sir. This is the approximate location where we stopped the car.

Q. At the gulley, by the bank there?

You are referring to plaintiff's Exhibit 24 for identification, is that correct?

A. Yes. This is the gulley.

Q. You are referring to plaintiff's Exhibit 25 for identification? [167]

A. Yes.

Q. Did you have occasion, Mr. Carlson, to visit or retrace the transportation of both Sage and Gaither with any officers, special agents of the Federal Bureau of Investigation?

A. Yes.

Q. Do you recall when that was done, to the best of your recollection?

A. That was done May or June, June 6th.

Q. What officers were with you?

A. Al Stewart, Federal Bureau Agent; Leslie Dieckman, Federal Bureau agent.

Q. At the time did you retrace the route taken on February 27, 1956?

A. Yes.

Mr. Babcock: At this time, your Honor, plain-

(Testimony of Victor L. Carlson.)

tiff offers into evidence Plaintiff's Exhibits Nos. 10, 11, 12, 13, 15, 16, 17, 19, 20 and 21 for identification.

The Court: Any objections?

Mr. Watson: We have never seen them, your Honor. No objection, your Honor.

Mr. Mattuecci: No objection.

The Court: There being no objections, government's offered exhibits 10, 11, 12, 13, 15, 16, 17, 19, 20 and 21 are received in evidence as government's exhibits by the same numbers. [168]

Mr. Babcock: At this time, your Honor, the plaintiff offers into evidence Plaintiff's Exhibits Nos. 22, 23, 24 and 25 for identification.

Mr. Watson: No objection, your Honor.

Mr. Matteucci: I have no objection.

The Court: Offered Exhibits Nos. 22, 23, 24 and 25 on the part of the government will be received in evidence by the same numbers.

Q. Mr. Carlson, at a time subsequent to February 28, 1956, did you have occasion to revisit the scene of the beatings? A. Yes.

Q. When was that, if you recall?

A. After the night of the 27th of February, I just gone off duty, ten or eleven o'clock at night, Eddie Clifton came down, driving a Chevrolet station wagon. He said, "Let's go for a ride, Vic," so I got in, went north on Main Street. I said, "Where are we going?" He said, "Chief Pool told me to get rid of that evidence." We drove back out 91 highway, up this gravel road, back of this mound

(Testimony of Victor L. Carlson.)

and knocked away the tire prints and foot prints and come back on the gravel road, drove up the same road we took with Sage, up this road to the bank there, turned off this road and went down this gulley where the couch was where they sat Sage. Clifton struck a match and burned it.

Q. Did it burn? [169]

A. Well, it lighted. I don't know if it kept burning.

Q. How long did you remain there?

A. Approximately five or ten minutes.

Q. At the time you left was it burning?

A. Yes, it was burning.

Q. What else did you do while you were there?

A. That's all. We came back to the police department. I went home.

Q. The flashlight that you have testified to, who was the owner of it?

A. I guess the North Las Vegas police department.

Q. Do you know where it is today?

A. When we left the Henderson jail, after booking Sage in, I believe we took the head off and threw the flashlight out in the field. That's the last time I seen it.

Q. You have never seen it since that time?

A. No.

Q. Did you return to that field at a later time?

A. Yes.

Q. In company of whom?

A. Federal agents.

(Testimony of Victor L. Carlson.)

Q. Whom? A. Dieckman and Stewart.

Q. For what purpose?

A. To see if we could find the flashlight. [170]

Q. Did you find it? A. No.

Q. Approximately when was that?

A. May or June of 1956.

Q. At around about that time did you return to the area of the gulley where Sage was taken, for any purpose?

A. Just with the F.B.I. agents.

Q. Did you observe the couch that was there?

A. We couldn't find it.

Q. Did you look for it? A. Yes.

Q. When was the last time you saw that couch that you referred to?

A. When Pool and Clifton and Sage sat on it.

The Court: This couch that has been referred to, is there any question as to any of it being a part of an automobile?

A. That was an old studio couch lying out there.

Q. When was the last time you saw that couch?

A. That was on February 27th.

Q. When you and Clifton were out there?

A. And Pool. Yes, Clifton and I.

Q. That is the last time you saw it?

A. Yes.

Mr. Babcock: You may inquire. [171]

The Court: At this point we will take our usual midafternoon recess.

(Jury admonished and recess taken at 3:00 o'clock.)

3:15 P.M.

(Defendants present with counsel and government counsel present. Presence of the jurors and alternate juror stipulated.)

MR. CARLSON

resumed the witness stand on

Cross-Examination

By Mr. Watson:

Q. Mr. Carlson, Mr. Gaither testified in court this morning that the blows he received were equally given by you and Mr. Pool, is that correct?

A. No, sir.

Q. He testified also that on occasions, when he was knocked to the ground, it was you who picked him up to be knocked down again, is that correct?

A. I didn't hear that last.

Q. I say he testified, that is Mr. Gaither, when he was knocked to the ground that you picked him, Mr. Gaither, up, to be knocked down again, is that true?

A. I picked him up, but I never knocked him down.

Q. You told us a little while ago that you, yourself, gave Mr. Gaither five or six blows, is that correct?

A. Slaps on the face.

Q. Where they sufficiently hard to make any injury to Mr. Gaither's face? Was there any swelling that you noticed? [172]

A. No, I don't believe so.

(Testimony of Victor L. Carlson.)

Q. What was the state of Mr. Gaither's clothing at the time you and Chief Pool, the three of you, returned to the North Las Vegas police department station?

A. I could see they were disarranged, but he had straightened them up by the time we arrived at the police department.

Q. Yesterday Mr. Sage told us that he received from you two kicks from behind in the region of the kidney, is that true?

A. No, I never touched Sage.

Q. You witnessed the alleged beating of Sage, but you did not participate in it in any way?

A. No, I just put my handcuffs on him.

Q. And Mr. Sage told us yesterday that you also, as well as another person present, drew your gun and came down into the gulley and menaced him with it. Is that statement of Mr. Sage's true?

A. It is.

Q. Mr. Gaither told us this morning that when this trip began out in the desert from North Las Vegas police station, that Mr. Pool was driving the car and you and he were sitting in the back seat, is that true?

A. No.

Q. It was the other way around?

A. I drove the car.

Q. Did you drive the car at all times when Mr. Sage, as you [173] have testified, was out being beaten up?

A. Yes, I drove the car all the times.

(Testimony of Victor L. Carlson.)

Q. At the time of the beating of Mr. Sage, did you protest at all to what was being done?

A. No, sir, I did not.

Q. Did you try to stop the other officers?

A. No, I did not. The only time, when I saw the Air Force plane, I told him the pilot could see him.

Q. And you urged him to go to another place where he could not be seen?

A. I did not.

Q. Sir? A. I didn't.

Q. Following these incidents, February 27th and February 28th and going to the investigation by the County grand jury which you told us about, Mr. Carlson, I am not going to ask you what your testimony was before the grand jury, rather I am going to ask you, did you not state to at least one other person here in Las Vegas that you had gone to the grand jury and had told the truth, which was that Sage had attempted to jump out of the car when you and Clifton were taking him over to Henderson. Didn't you say that to someone after your testimony given to the County grand jury?

A. I could have; I don't recall it.

Q. Was your testimony before the County grand jury influenced [174] in any way by Mr. Pool or by Mr. Clifton? A. By Chief Pool.

Q. You testified at the County grand jury under duress, is that correct? A. Yes.

Q. Mr. Carlson, I show you what has been marked, for the purpose of identification, defend-

(Testimony of Victor L. Carlson.)

ants' Exhibit C, and ask you to examine it and tell me whether or not you recognize it?

A. Yes, I recognize it.

Q. What is Defendants' Exhibit C, please, Mr. Carlson?

A. This is a statement we had to make under direction, on order, from Pool and Clifton, to get the heat off of us from the County grand jury.

Q. Is the statement signed by you, Mr. Carlson?

A. Yes.

Q. When you signed it—what date is the statement?

A. February 27th.

Q. Now February 27th, Mr. Carlson, is the date of the burglaries and it is the date of the alleged beatings, is it not?

A. Right.

Q. And didn't you tell us it was one or two days later that you heard there was going to be heat from the County grand jury?

A. Yes.

Q. And on February 27th, Mr. Carlson, is there a time marked on there also when the report was delivered and made? [175]

A. Yes, eleven p.m.

Q. Now at eleven p.m. that night, February 27, 1956, you did not know about this heat that might come from the County grand jury, did you?

A. This was a cover-up for him, in case anything come up. We found out about the statement to Dr. French at the city jail in Henderson.

Q. But you didn't know about the grand jury at eleven o'clock that night, February 27th?

A. No, we didn't at this particular time.

(Testimony of Victor L. Carlson.)

Q. I show you now, Mr. Carlson, what has been marked, for the purposes of identification, Defendants' Exhibit D, a document of several pages, which I ask you to examine and tell me whether or not you recognize that? What is the document, Mr. Carlson?

A. This is a statement made to take any heat away from us.

Q. By whom was it made?

A. It was typewritten by Ramona.

Q. Whose words is it in?

A. Those are my words.

Q. And whose signature is at the end of it?

A. My signature.

Q. And what is the date, Mr. Carlson?

A. March 3rd.

Q. I now show you, Mr. Carlson, a document of four pages, [176] which are collectively known as Defendants' Exhibit D, and ask you to give your attention to what appears to be a signature written sideways on the margin of that page. Is that your signature?

A. It looks like my signature.

Q. Then the same month of March, 1956, when you say the heat of the County grand jury was on all of you, you were discharged from the North Las Vegas police department by Chief Pool, were you not, Mr. Carlson?

A. No, I was discharged by William McMinch on April 25, 1956.

Q. Do you know whether or not this was done without the knowledge of Chief Pool?

(Testimony of Victor L. Carlson.)

A. I didn't hear that.

Q. Do you whether or not this discharge from the police department was done by Mr. McMinch without the knowledge of Mr. Pool?

A. I don't know if Chief Pool had knowledge of it or not.

Q. Did you find out later whether he had knowledge of it? A. I did not.

Mr. Watson: At this time defendant Pool, if the Court please, offers in evidence Defendants' Exhibit C and Exhibit D.

Mr. Babcock: May we have the Court's indulgence, your Honor?

The Court: Counsel may examine it. [177]

Voir Dire Examination

By Mr. Babcock:

Q. Mr. Carlson, I hand you what has been marked Defendants' Exhibit C for identification, and I will ask you at what time of day it was that that statement was made?

A. This statement was, I believe it was, made after Dr. French had seen Sage at the jail in Henderson.

Q. Was that statement made by you in the North Las Vegas police department? A. Yes.

Q. Were you on duty at that time, do you recall?

A. I don't just recall the time. I could have dated it back one hour or the other.

Q. That statement appears to be written on a

(Testimony of Victor L. Carlson.)

mimeograph paper under the name of the police department, North Las Vegas, Nevada. Was that type of paper used by you and other officers in recording statements for disposition of cases?

A. Yes.

Q. What did you do after you signed that exhibit?
A. Gave this to Chief Pool.

Q. Do you know what Chief Pool did with it?

A. No, I don't.

Mr. Babcock: Your Honor, we object on the grounds it appears to be original document of the police department, therefore no foundation has been laid as to custody.

The Court: May I see the document? I think the objection [178] is probably good, at least it is on the face an official document. Do you wish to lay a foundation, counsel?

Mr. Watson: Your Honor, I do not know whether or not as to the other exhibits. May I ask counsel's stand on the other exhibits? We have no alternative theories to offer the Court.

Q. (By Mr. Babcock): Mr. Carlson, I hand you what has been marked Defendants' Exhibit A for identification. This appears to be a copy, a type-written copy, bearing a signature in ink, which you have identified as yours. Do you know where the original of that is?
A. No, I do not.

Q. Did you sign more than one copy of that statement?
A. Not that I remember.

Q. Did you ever see an original?

A. This is about the only thing I have seen, right here.

(Testimony of Victor L. Carlson.)

Q. After you signed that particular statement, what did you do with it?

A. Gave it to Chief Pool.

Q. Was that statement made in the ordinary and usual course of your duties as a police officer with the North Las Vegas police department? Was it made while you were on duty?

A. It could have been; I don't remember.

Q. Do you know if it was filed with any of the records of the [179] North Las Vegas police department? A. I do not know.

Q. When was the last time you ever saw that statement, if you can recall?

A. I don't recall.

Mr. Babcock: May I inquire of counsel if this purports to be a copy of the North Las Vegas police department, made in the usual and ordinary course of business of that department?

Mr. Watson: May it please the Court, it is my understanding that it did not have the character of being an official document at all, but simply was an explanation which was written up by Mr. Carlson and offered to Mr. Pool and set forth a verification of facts and explanation of Mr. Carlson's notes. It appears to be a copy, by which I suppose it means it is on thin paper. I would like to point out to the Court that it is signed, it is in every respect, so far as I know, the original statement, nor do I know it to be an official document.

The Court: What did you say about official document?

(Testimony of Victor L. Carlson.)

Mr. Watson: I do not know that they are official documents.

The Court: Well, how did you get these into your possession? Defendants' Exhibit C for identification appears to be on the official form of the North Las Vegas police department. Were [180] these taken from the records of the North Las Vegas police department?

Mr. Watson: Not by me, your Honor, nor were they to my knowledge. They were delivered to me by my client.

The Court: As to defendants' D for identification, your objection to that, Mr. Babcock, was based on the proposition that it was a carbon copy?

Mr. Babcock: No, your Honor, it again purports to be a document taken under circumstances which would reflect it to be an official record of the North Las Vegas police department, by reason of investigation of certain burglaries in that city.

The Court: Well, the objection is overruled as to defendants' D and D is admitted in evidence.

You offered it, didn't you, counsel?

Mr. Watson: I did, your Honor. I pass the witness.

The Court: You have offered C also?

Mr. Watson: Yes, your Honor, and I understand the Court overruled—I mean to say, excluded C and admitted D. Am I correct?

The Court: Correct.

(Testimony of Victor L. Carlson.)

Cross-Examination

By Mr. Matteucci:

Q. Mr. Carlson, you stated it was about three p.m. when you returned from the desert at the time of this alleged beating of Mr. Sage, is that correct?

A. As near as to my knowledge, it was approximately three, [181] one way or another.

Q. How far one way or the other would you say?

A. It would be thirty minutes one way or the other.

Q. Then you stayed around the North Las Vegas police department how long?

A. We left immediately for Henderson and Chief Pool got out at the open end of the police department.

Q. And you left? A. Yes.

Mr. Matteucci: That's all.

The Court: Counsel, Mr. Watson, if you can lay a foundation for your offered Exhibit C for identification, the Court will then reconsider the matter of the offer.

Mr. Watson: Thank you, your Honor.

Redirect Examination

By Mr. Babcock:

Q. Mr. Carlson, I wish to inquire of you concerning defendants' Exhibit D in evidence, which is a four-page, single line typewritten document, and ask when this statement was signed by you?

A. I signed this—I dictated the report to

(Testimony of Victor L. Carlson.)

Ramona, our secretary, and after she had type-written it, I would have had to sign it.

Q. Who is Ramona?

A. Chief Pool's wife, the secretary. [182]

Q. Do you recall where this statement was dictated to Ramona?

A. It would have had to have been in the police department.

Q. It was done in the police department, is that correct?

A. Yes, we usually dictated our statements.

Q. Was that statement dictated to Ramona while she was on duty as secretary of the North Las Vegas police department?

A. As near as I remember it was.

Q. Do you recall if you were on duty at the time you dictated that statement to Ramona?

The Court: Counsel, I am just a bit confused, perhaps the witness is, too. What do you mean "on duty"?

Mr. Babcock: On duty as a police officer.

The Court: As distinguished from a private citizen?

Mr. Babcock: As a person coming on to the police department for the purposes of his own business.

The Court: In other words, was it done in connection with police business?

Mr. Babcock: Yes, that is correct.

A. Yes, I was on duty.

Q. When is that statement dated?

(Testimony of Victor L. Carlson.)

A. March 3, 1956.

Q. Why did you make this statement?

A. I made that statement to cover the North Las Vegas police department, to get heat off the grand jury if anything arose [183] from the grand jury.

Q. What were you trying to cover up?

A. The alleged beating of Sage and Gaither.

Q. Who requested you to make this statement, if any one did? A. Chief Pool gave orders.

Q. And when was that done, if you recall?

A. Right after he came back from Los Angeles, as near as I remember.

Q. Was that the trip that he came back with you? A. Yes.

Q. Were any threats made against you in connection with this statement? A. Yes.

Q. By whom? A. By Chief Pool.

Q. When?

A. And Eddie Clifton; we had to testify this right down the line before the grand jury, or we would be found on the desert.

Q. When was that statement made?

A. That was made three or four times.

Q. On page 2 of this statement, Mr. Carlson, I can't determine the line, but in about the bottom quarter of this page, it reads as follows: "We had road approximately six blocks." Did that happen on that date? A. No. [184]

Q. Did you stop the car in an effort to keep Sage from jumping out of the car? A. No.

(Testimony of Victor L. Carlson.)

Q. Are certain portions of this statement true—I am referring to defendants' Exhibit D in evidence? A. No.

Q. You have had an opportunity to read this, have you not? A. Yes.

Q. Are certain portions of this statement false?

A. Yes.

Q. Why did you sign it if certain portions of this statement are false?

A. I was told to sign it to testify on, or we would be found out in the desert.

Mr. Babcock: That is all we have, your Honor.

Mr. Watson: No questions, your Honor.

Mr. Matteucci: No questions, your Honor.

(Witness excused.)

RAMONA WOLF

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name?

A. Ramona Wolf.

Q. Where do you reside?

A. 214 West Drive, Detroit Lakes, [185] Minnesota.

Q. Did you ever reside in North Las Vegas, Nevada? A. Yes, sir.

Q. When?

(Testimony of Ramona Wolf.)

A. I came to North Las Vegas October of 1955.

Q. How long did you reside in North Las Vegas, Nevada?

A. Until the fore part of April of '56.

Q. Were you ever in the employ of the North Las Vegas police department? A. Yes, sir.

Q. Will you state the dates of that employment?

A. I started in October, 1955, and I worked until December, then I started working again in February of 1956.

Q. When did you start working in February of 1956?

A. I am not sure; the fore part.

Q. In the fore part of February, 1956, what type of work were you doing in the North Las Vegas police department?

A. I was typist and secretary to Chief Pool, chief stenographer and relief dispatcher.

Q. What were your hours of duty in the month of February, 1956?

A. From eight a.m. until four p.m.

Q. Each working day? A. Yes, sir.

Q. On February 27, 1956, were you on duty at the North Las Vegas police department?

A. Yes, sir, I was. [186]

Q. In the same capacity you have testified to?

Mr. Watson: I would like to take the witness on voir dire as to her competence to testify.

The Court: As to what?

Mr. Watson: Her competence to testify. I mean, your Honor, the fact that I would like to inquire.

(Testimony of Ramona Wolf.)

Voir Dire Examination

By Mr. Watson:

Mrs. Wolf, at the time in question, February 27, 1956, were you married? A. Yes, sir.

Q. At that time were you married to this man, the defendant, William Pool? A. Yes, sir.

Q. You were married to him in December of the preceding year, 1955? A. Yes.

Q. And remained married to him until April of 1956? A. Yes, sir.

Mr. Watson: If the Court please, although the marriage has been dissolved, the fact that this witness was in such relation to the defendant during the time in question, I believe should make her incompetent. I move she not be permitted to testify against her former husband.

The Court: Do you say that seriously. I have not heard any question as to confidential communication. [187]

Mr. Watson: Your Honor, it is my understanding of the law the mere calling a witness under such circumstances and position would be sufficient to raise the issue.

The Court: Well, counsel, what is your position?

Mr. Babcock: In response to that, your Honor, the plaintiff takes this position—we will not ask of her any confidential communication at or about the time in question. We feel we have the right to

(Testimony of Ramona Wolf.)

inquire of her as to her observation of things that occurred at the police department or perhaps elsewhere, in conjunction with her official duties as a private secretary to Mr. Pool and police stenographer and a dispatcher of the North Las Vegas police department. During the course of this interrogation, we will not inquire of her as to any communication, as to any conversation had alone with Mr. Pool.

The Court: Objection overruled. The witness may testify. The Court rules as it does particularly to the fact that this witness occupied an official position with the police department of North Las Vegas and may testify as to those matters which occurred during the time in question and became known to her in her official capacity as an employee of the police department, which matters are not in the nature of confidential communication between herself and her husband. [188]

Mr. Babcock: Your Honor, I wish to instruct the witness as to your order. I will not inquire of you as to any communication, confidential or otherwise, had alone with the defendant William Cecil Pool. You understand? And so if there is any communication or conversation you might be referring to just between the two of you, please do not answer.

(Testimony of Ramona Wolf.)

Direct Examination

(Continued)

By Mr. Babcock:

Q. I believe you testified that you were on duty with the North Las Vegas police department on February 27, 1956? A. Yes.

Q. In the capacity you have previously testified to, is that correct? A. Yes.

Q. Do you know a man by the name of Coite Gaither, Jr.? A. Yes, sir; I do.

Q. When did you first see him, if you recall?

A. In the office, when he was brought in the North Las Vegas police department on the morning of February 27th.

Q. About what time of day was that?

A. I don't recall, mid-morning; I don't recall the exact time.

Q. What was done with Coite Gaither upon his arrival at the police station?

A. He was placed in the room where Chief Pool is located.

Q. Did you have occasion to observe the movements of Gaither on that morning or that day?

A. Yes, sir.

Q. After you observed him in the room of Chief Pool, what next did you observe in relation to Coite Gaither?

A. I saw Chief Pool interrogating Mr. Gaither. I didn't hear any of the conversation at all, with the exception of Chief Pool saying, "You are lying."

(Testimony of Ramona Wolf.)

Q. Then what was the next thing you observed in relation to Coite Gaither?

A. Then Chief Pool called into the desk. He asked me——

Q. Just one moment—was any one present?

A. Mr. Gaither and Chief Pool and I.

Q. What was said?

A. I was called to his desk to take a statement from Mr. Gaither and Chief Pool dictated the statement and read it to Mr. Gaither and after I transcribed the statement I handed it to Mr. Gaither and he signed it.

Q. What happened to the statement that Mr. Gaither signed, if you know?

A. I don't know.

Q. Was it handed back to you?

A. No, sir.

Q. Next what did you observe in relation to Coite Gaither?

A. Well, a few minutes later Chief Pool said——

Q. Now, who was present when Chief Pool made the statement you are referring to? [190]

A. Just Mr. Gaither and Chief Pool and me.

Q. Was Gaither present at the time you heard this communication? A. Yes, sir; he was.

Q. Proceed.

A. I heard Chief Pool say, "Come on, we will go for a ride."

Q. Then what happened? A. They left.

Q. Who left?

A. Chief Pool and Mr. Gaither went out the

(Testimony of Ramona Wolf.)

door and I didn't see them go in the car or anything. They were gone about an hour or so.

Q. Did you observe anyone else leaving with Chief Pool and Gaither out of the police department? A. No, sir.

Q. Did you observe who returned with Chief Pool and Gaither upon their return, after an absence of an hour or so?

A. The only one that came to the door of the police department was Mr. Gaither and Chief Pool.

Q. Did you observe the movements of Gaither at that time? A. He was ordered to sit down.

Q. Did you observe his physical condition at that time?

A. At that time I thought his face was very flushed and red. I didn't know what it was about.

Q. Did you observe if his face was flushed and red at the [191] time he was being interrogated by Chief Pool before their absence?

A. No, sir; I did not.

Q. What is the next thing you observed in relation to Coite Gaither?

A. All I remember him sitting there in the chair.

Q. When was the last time you saw Coite Gaither on that day? A. I don't recall.

Q. Were you, during this period of time, going about your duties as dispatcher and the like?

A. Yes, sir.

Q. Do you know a person by the name of Ray Lewis Sage, Jr.? A. Yes, sir.

Q. Did you have occasion to see him on or about

(Testimony of Ramona Wolf.)

February 27, 1956? A. Yes, sir.

Q. Where did you see him?

A. I saw him in the police car in front of the police station. I happened to look out the window and I saw him. I later found out it was Ray Sage. He went to the police car with Chief Pool, Edward Clifton, Vic Carlson. I don't remember the position.

Q. What time of day was it?

A. I can't say, sir; it was later in the day.

Q. Was it morning or afternoon, if you recall? If you don't [192] know, just tell us.

A. I don't know.

Q. How long did you have occasion to observe these four people in the automobile at that time?

A. Well, I had other duties to do. I didn't stand there and watch.

Q. That is what I am asking, just how long?

A. I just looked out for a few moments and the next time I looked out they were gone. I don't know what happened.

Q. When was the next time you saw Ray Lewis Sage, Jr.?

A. Not until the next night, the 28th.

Q. You testified that they were gone in this car?

A. Yes, sir.

Q. Now from that moment, when was the next time that you saw Chief Pool, Capt. Clifton and Vic Carlson?

A. Later that day. I don't know what time.

Q. About how much later?

A. I couldn't say. I don't remember their com-

(Testimony of Ramona Wolf.)

ing to the door or anything. All I know they were there.

Mr. Babcock: You may inquire.

Mr. Watson: No questions.

Mr. Matteucci: No questions.

(Witness excused.) [193]

WILLIAM N. WITTE

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name, please?

A. William N. Witte.

Q. What is your occupation?

A. Deputy sheriff Clark County, Las Vegas, Nevada.

Q. Where is your residence?

A. Paradise Valley, Las Vegas.

Q. How long have you been a deputy sheriff of Clark County?

A. Approximately five years.

Q. What are your duties as such?

A. I am the sergeant in charge of the identification bureau of the sheriff's department.

Q. On February 27, 1956, or thereabouts, what were your duties with the Clark County sheriff's department?

A. On the 27th and through the remaining time

(Testimony of William N. White.)

after that, I was in charge of the fingerprints, photographing, casts and prints for the department.

Q. Did you have occasion to take a photograph of a person by the name of Ray Lewis Sage, Jr.?

A. Yes, sir; I did.

Q. When was that photograph taken?

A. It was taken on the morning of the 30th of February.

Q. Where was that photograph taken? [194]

A. Inside the detective bureau, sheriff's office.

Q. Do I understand the photograph was taken by you? A. Yes, sir; it was.

Q. What type of camera?

A. X-7 reflex 35 mm.

Q. What type of print is developed from that type of camera?

A. That particular photograph was a color transparency, 35 mm.

Q. How many pictures did you take of Ray Lewis Sage on that day? A. Two.

Q. Do you have them with you?

A. Yes, sir; I do.

Q. May I see them. Sergeant, I hand you plaintiff's Exhibit 26 for identification, which purports to be a box containing two slides, and I will ask if you can identify this proposed exhibit?

A. Yes, sir.

Q. What is it?

A. These are glass-mounted slides of Mr. Sage I took on that date, these slides being inscribed with the number and initials of the department.

(Testimony of William N. White.)

Q. By whom were those photographs taken?

A. By myself.

Mr. Babcock: I offer into evidence plaintiff's Exhibit 26 for identification.

Mr. Watson: May I see them? [195]

Q. May I ask, Sergeant, do those two prints accurately and truly portray the person of Ray Lewis Sage on the date the photographs were taken?

A. Yes, sir; they do.

Mr. Watson: I am going to object to this introduction, for the reason first, the evidence as to the condition of Mr. Sage's body is already put in the record by Dr. French. These are extra film and are only introduced for the purpose of prejudicing the jury. Secondly, your Honor, they have not been identified as to specific date. Your Honor can take judicial notice there is no such date as February 30th this or last year and never has been and that is the date the pictures were alleged to have been taken, by the testimony of Mr. Witte.

The Court: I understand the witness to say there was no date inscribed on the pictures.

A. No, sir; there was not.

The Court: What is your best recollection as to the date the pictures were taken?

A. The morning after the booking of Mr. Sage.

Q. Do you recall what the approximate date was?

A. He was, I believe, booked into the county jail on the 29th of February. I am not certain.

The Court: Objection overruled. The exhibit

(Testimony of William N. White.)

will be received in evidence as government's Exhibit 26.

Q. Sergeant Witte, the slides are a small picture, are they [196] not? A. Yes, they are.

Q. Do you have facility to project these slides and give a more detailed view of the photographs?

A. Yes, sir.

Q. Do you have such equipment here?

A. Yes, sir.

(Permission granted to project slides and pictures shown.)

Q. Sergeant Witte, I hand you plaintiff's Exhibit 27 for identification, which purports to be a postive print, photographic print, and ask if you can identify that proposed exhibit?

A. Yes, sir; I can.

Q. What is it?

A. This is from the negative of the black and white print pictures that were taken at the same time that I took the colored prints.

Q. What is the subject of this proposed exhibit; who is the person? A. Ray Sage.

Q. When was the photograph taken?

A. At the same moment, or within the next few moments, that I took the colored transparencies.

Q. At the Clark County sheriff's office, Las Vegas, Nevada? A. Yes, sir.

Q. I hand you what has been marked plaintiff's Exhibit 28 for [197] identification and ask you if you can identify that proposed exhibit?

(Testimony of William N. White.)

A. Yes, sir; I can.

Q. What is it?

A. This is a photograph of Ray Sage taken at a distance in the detective bureau of the sheriff's department, at the same time I took the others.

Q. Do the two photographs, namely, plaintiff's Exhibits 27 and 28 for identification, accurately and actually portray the condition of the person whose picture is shown herein? Do these accurately show the condition of the person of Ray Sage at the time the photographs were taken?

A. No, sir.

Q. In what way?

A. The black and white photograph does not portray the actual facts. These areas are nothing but gray color, therefore, the color would not accurately portray the actual facts.

Q. For a black and white print, do these prints accurately portray the condition by photograph of the person of Ray Sage on that date?

A. Yes, sir; for black and white.

Mr. Babcock: We offer into evidence plaintiff's Exhibits 27 and 28.

No objection.

The Court: There being no objections, the offers are [198] received in evidence as government's Exhibits 27 and 28, these being black and white photographs of Mr. Sage.

Mr. Babcock: You may inquire.

Mr. Watson: No questions.

Mr. Matteucci: No questions.

(Witness excused. Jury admonished and court recessed at 4:25 p.m.)

Wednesday, October 16. 1956, 10:00 A. M.

Defendants present with counsel and government counsel present. Presence of the jurors and alternate juror stipulated.

WILLIAM O'REILLY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Babcock:

Q. Will you state your name?

A. William O'Reilly.

Q. Where do you reside?

A. 3792 Paradise Valley Road.

Q. Clark County, Nevada?

A. Clark County, Nevada.

Q. What is your occupation?

A. Deputy sheriff, Clark County, Las Vegas.

Q. How long have you been associated with the Clark County sheriff's office?

A. Eight years. [199]

Q. In the months of February and March of 1956 were you a deputy sheriff with the Clark County sheriff's office? A. I was.

Q. In what capacity?

A. Chief of detectives.

Q. On or about that time did you have occasion

(Testimony of William O'Reilly.)

to see Coite Gaither, Jr., and Ray Lewis Sage, Jr., at the Clark County jail, Clark County, Nevada?

A. Yes; I did.

Q. On what date did you see them?

A. The first day I saw them was on February 29th, approximately 5:00 p.m.

Q. When was the second time you saw them?

A. Approximately 11:00 o'clock the morning of March 1st.

Q. Did you have occasion to observe the physical appearance of Coite Gaither, Jr., and Ray Lewis Sage, Jr.?

A. Yes; I did.

Q. On what date was that?

A. That was on March 1st.

Q. 1956?

A. 1956.

Q. Where did you observe the physical appearance of these two persons?

A. In the Detective Bureau of Clark County sheriff's office.

Q. Under what circumstances? [200]

A. We received a report from the jail that there were two men that were injured in our jail and I sent Sergeant Parrish to the jail and had them brought to me.

Q. And then what happened?

A. Ray Sage and Coite Gaither came into the Detective Bureau, said they had been injured——

Q. No conversation. Did you observe them at that time?

A. Yes; I did.

Q. What did you observe?

A. I had them remove their shirts and I noticed

(Testimony of William O'Reilly.)

that Ray Sage had numerous bruises all through the chest area and stomach area and Coite Gaither had yellowish-grayish bruises on the chest area and on the lower stomach area, and also a bruise on the back on the right shoulder.

Q. I show you plaintiff's Exhibits Nos. 27 and 28 in evidence and ask if you can identify these two exhibits?

A. Yes, these were pictures taken in the Clark County sheriff's office of Ray Sage March 1st.

Q. At the time you observed the physical appearance of Ray Sage, do those photographs represent accurately the appearance as you observed that on March 1, 1956? A. They do.

Mr. Babcock: You may inquire.

Cross-Examination

By Mr. Watson:

Q. Mr. O'Reilly, did you call a doctor? [201]

A. I did not call a doctor into the sheriff's department, no.

Mr. Watson: That's all.

Cross-Examination

By Mr. Matteucci:

Q. Mr. O'Reilly, did you take pictures of the injuries to Mr. Gaither? A. No; I did not.

Q. Did anybody in the sheriff's office take pictures of the injuries to Mr. Gaither?

A. No; they did not.

(Testimony of William O'Reilly.)

Q. But they did take pictures of the injuries to Mr. Sage, is that right? A. Yes.

Q. Do you know when they were taken?

A. They were taken approximately noon, March 1, 1956.

Q. And the boys were brought into the Clark County sheriff's office on the 29th?

A. They were booked in previous night, on the 29th.

Mr. Matteucci: That's all.

Mr. Babcock: No further questions.

(Witness excused.)

Mr. Babcock: The United States rests, your Honor.

(Opening statement waived on part of both defendants.)

MOTION IN THE ABSENCE OF THE JURY

Mr. Matteucci: At this time, your Honor, I want to make a motion for acquittal on Count 1 on behalf of Clifton and [202] Pool. The basis of the motion, your Honor, is this: That there is no evidence in the record to show Sage was in any way beaten for the purposes of securing a confession. Your Honor, I believe—I know you are acquainted with the fact—that there must be evidence beyond a reasonable doubt to convict these two defendants. The only statement we have at the time of these alleged beatings is the fact that one of them accused in this

action said to Mr. Sage, "Are you going to tell the truth?" That is all, your Honor. Now, on that basis alone, I move for a judgment of acquittal.

Mr. Watson: If the Court please, may I ask the same grounds be urged on behalf of the Defendant Pool as to Counts 1 and 2 and Defendant Pool be considered to have made the motion for judgment of acquittal on those grounds as to Counts 1 and 2?

The Court: The record will so show. Does counsel for the government desire to make any comment in connection with the motions?

Mr. Babcock: The government feels, your Honor, you have heard the evidence and we submit the motions without further argument.

The Court: The motions for acquittal made by counsel on behalf of the Defendant Pool and Defendant Clifton, going to Count 1 and Count 2 of the indictment, are denied. Mr. Marshal, you will return [203] the jury to the courtroom.

10:15 A.M.

(Defendants present with counsel and government counsel present. Presence of the jurors and alternate juror stipulated.)

AL FERGUSON

a witness on behalf of Defendant Pool, being duly sworn, testified as follows:

Direct Examination

By Mr. Watson:

Q. Will you state your name, please?

A. Al Ferguson.

(Testimony of Al Ferguson.)

Q. What is your address?

A. 1919 Bruce Avenue, North Las Vegas.

Q. Mr. Ferguson, on or about February 27th and 28th, 1956, did you hold an official position in the governing of the City of North Las Vegas, Nevada?

A. I did.

Q. What was that position?

A. Police commissioner.

Q. Do you know Ray Lewis Sage, Jr.?

A. Yes, sir.

Q. Do you know Coite M. Gaither, Jr.?

A. Yes, sir.

Q. Did you participate in the investigation by the North Las Vegas police department of the activities of those two persons?

A. Yes, sir. [203-A]

Q. Were you present on the evening of February 28, 1956, when Ray Lewis Sage was at the North Las Vegas police station and being interrogated?

A. Yes, sir.

Q. Please tell the Court and jury what happened on that occasion?

A. The evening of the 28th, when I got through work at 5:00 o'clock, I went home, cleaned up and changed clothes and went back to the North Las Vegas police station and some time during the evening—I don't remember exactly the time, but Sage was making out a report.

Q. Who was present at that time, if you know?

A. Well, Chief Pool was present and officers on duty, Betty Phillips, I believe, the stenographer. It

(Testimony of Al Ferguson.)

has been so long ago I just don't remember all the names.

Q. What occurred, if you recall, at the time Mr. Sage was making out this statement?

A. He was sitting at the outer desk, writing his statement out and with the men on duty coming in and out of the station they kept distracting his attention from what he was doing and he was asked if he wanted to go back in the court room and sit at that desk and finish his statement, because of the confusion of people coming in and going out of the police station, and he went into the courtroom and sat at the desk and finished his statement back there, the best I recall. [204]

Q. Who went back into the courtroom with him?

A. Oh, we were in and out of the court room, Chief Pool, Betty Phillips and myself, we went in and out and we took him a cup of coffee, sat around and drank coffee.

Q. Did you observe, before Mr. Sage went into the inner room to avoid the confusion, did you observe any one dictating the statement to Mr. Sage?

A. No, sir; he was sitting at the desk alone.

Q. And writing it out? A. Yes, sir.

Q. After he went back into the courtroom, where you say you and Miss Phillips were in and out, was any one dictating what to say to him then?

A. No, sir; he was in there alone part of the time, writing.

Q. Did you ever have occasion to see any wounds or injuries to Mr. Sage's body?

(Testimony of Al Ferguson.)

A. I did that evening, sir.

Q. Will you please tell the circumstances of that?

A. We were sitting drinking coffee and talking about the case and reports, etc., and Chief Pool asked me, he said, "Have you seen the marks on Sage," and I said, "No, sir." He said, "Sage, would you show the commissioner the marks you have," and he got up from his writing and undone his shirt and turned around and that was the first I saw any marks upon him.

Q. And you say those marks were shown to you at the suggestion [205] of Mr. Pool?

A. Yes, sir.

Q. You know Mr. Pool, do you not?

A. Yes, sir.

Q. Were you present at the time in the North Las Vegas police department on the 28th of February when Mr. Coite M. Gaither, Jr., was being interrogated?

A. Yes, sir.

Q. Do you know how Mr. Gaither got to the police station?

A. Yes, sir.

Q. How did he get there?

A. It seems to me it was about 6:00 o'clock, after I got off work, I believe it was, Vic Carlson—there were three of us, Vic Carlson and one of the other officers and myself—went to the Las Vegas police department and picked up Gaither, took him back to the North Las Vegas police department.

Q. Where did you pick him up?

(Testimony of Al Ferguson.)

A. From the Las Vegas police department, out of their jail.

Q. And you took him to the North Las Vegas police department, is that right? A. Yes, sir.

Q. What happened then, after you got there?

A. As we were going down to North Las Vegas, I was sitting on the right-hand side, the other officer was driving, Vic Carlson was sitting directly behind the driver and Gaither sitting behind [206] me and we were talking to Gaither, that we wanted to find what he had done and he kept saying, "No, I don't know a thing about it." He said, "You have the wrong party."

Q. Was Mr. Pool present at that time?

A. No, sir.

Q. Go ahead.

A. And we knew that two of the lads, one of the fellows involved or indirectly involved, and another girl had brought a large sack to the police department that evening, with the money in it. We had the evidence already and we were kidding him about confessing and so on and he still pleaded innocence and when he walked into the police department, I forget which officer it was at the desk, pulled out this big sack and held it to him as he walked in and said, "Do you recognize this?" He kind of put his head down and said "Yes," and he started breaking then, admitting.

Q. He started admitting the burglaries he had committed? -

(Testimony of Al Ferguson.)

A. That is right. I believe we also told him that Sage had admitted it. I am not sure of that.

Q. What happened then?

A. We sat around there interrogating him and talking to him and getting a little bit on him, what happened, and he kept telling us——

Mr. Babcock: May I inquire who was present?

Q. Please tell us who was present. [207]

A. Chief Pool, myself, Gaither, and I believe Vic Carlson, I am not sure—yes, Vic was there, because he had been with us and he kept telling us—well, it is a little vague what he said, I don't remember too much what happened. We asked him where he had dumped the machines and he said, "Well, I can't tell you, I will have to take you there, I can show you." So Chief Pool said, "Well, if we take you out there, will you know where they are at," and he said, "Yes, I am pretty sure I can find the place," so they said, "Let's go find it," and I believe it was Chief Pool and Vic Carlson and Gaither, they asked me to go, did I want to go to the country with them and I said, "No, I will wait for you to come back."

Q. That was what time, would you say?

A. I believe that must have been approximately 7:00 or 8:00 o'clock.

Q. And did they leave then?

A. Yes; they did.

Q. Did you see them at any time later that evening?

A. When they brought the machines back.

(Testimony of Al Ferguson.)

Q. How long was that before they brought the machines back?

A. I would say it was about an hour.

Q. And at that time Mr. Carlson and Chief Pool and Mr. Gaither all returned? A. Yes, sir.

Q. And you were still there? [208]

A. Yes, sir.

Q. What happened after they returned?

A. I believe then—I believe Gaither sat down to make his statement, I am not positive of that. That did transpire that evening.

Q. Did you see Mr. Gaither when he was making the statement?

A. Yes, we were just sitting around.

Q. Was any one dictating the statement, or was he making it himself?

A. There was no dictation made to any of these people, to my knowledge.

Q. Have you ever been in the Oxford Club, Mr. Ferguson? A. Yes, sir.

Q. Have you ever been there in company of Mr. Gaither? A. Yes, sir.

Q. Who else was present when you and Mr. Gaither were at the Oxford Club?

A. Chief Pool, Vic Carlson, I believe, I am not sure, I believe Ramona Pool was working that evening, but six of us went over and sat in this booth.

Q. What evening was it that you and Chief Pool and Mr. Gaither and Vic Carlson were all present at the Oxford Club?

(Testimony of Al Ferguson.)

A. That was the night of the 28th.

Q. That same evening? A. Yes, sir. [209]

Q. What happened when all of you were there?

A. It seems like all of the details of this case was finished, except some typing, etc., and no one had eaten supper yet and I said, "If you fellows haven't eaten," I said, "I will take you over and buy your supper," and we asked Gaither if he had eaten and he said no he hadn't, so he joined us and we went over to the Oxford Club and every one, I believe, ordered steaks except Gaither.

Q. What did Gaither order?

A. Gaither ordered a bowl of tomato soup, and I started kidding him about the high living he had done in the past and he said, "Well, my stomach is just upset." He said, "I just had too much drinking, I just can't hold a steak." I said, "Well, order what you want." I said, "I may never buy you a steak again," and he ordered a bowl of soup.

Q. Mr. Ferguson, I show you, for the purpose of identification, document consisting of four pages, which have been designated defendants' Exhibit B, and ask you to examine the margin on the fourth page of this document and tell me whether or not you recognize this writing there in the margin?

A. That is my writing.

Q. And what does it say?

A. Witness Al Ferguson.

Q. Is that your signature, "Al Ferguson"?

A. Yes, sir. [210]

Q. Did you at anytime inform Mr. Gaither of

(Testimony of Al Ferguson.)

your official position? A. Yes, sir.

Q. You had told him that you were police commissioner of North Las Vegas?

A. When we picked him up at the city jail, on the way to North Las Vegas from the city jail, I hold him who I was.

Q. At any time did Mr. Gaither complain to you having been beaten? A. No, sir.

Q. Now, you told us that Mr. Sage, at Chief Pool's suggestion, showed you his injuries. Was there any conversation between you and Mr. Sage about that?

A. I asked Mr. Sage, I said, "Man, how did you get those," and he just said, "You know," just shrugged his shoulder. I said, "I don't know." He didn't answer me any more.

Mr. Watson: Your witness, your Honor.

Cross-Examination

By Mr. Babcock:

Q. Mr. Ferguson, are you at the present time police commissioner of North Las Vegas?

A. No, sir.

Q. When was that office terminated?

A. May of 1956.

Q. As police commissioner, what were your duties? A. I was also councilman. [211]

Q. As police commissioner, what were your duties?

A. More or less to be a liaison between the police department and the public.

(Testimony of Al Ferguson.)

Q. Did you spend much time at the North Las Vegas police department? A. Yes, I did.

Q. Did you assist, on occasions, in the investigating of cases? A. Interrogating, yes, sir.

Q. You acted more or less as a police officer?

A. No, sir.

Q. Referring to this defendants' Exhibit B, which was shown to you by counsel, for identification, which appears to be a photostatic copy of an original. Did you see the original of this statement?

A. Yes, sir.

Q. What was the color of the paper?

A. I believe it was white.

Q. Was the writing on it in pencil or ink?

A. I believe—it is two years ago, I can't recall.

Q. Do you recall if you signed it in pencil or ink? A. I believe my signature was in ink.

Q. After you signed this document, what happened to the original?

A. The original, sir, it was taken to the grand jury by the [212] D. A.'s office.

Q. By whom? A. By Chief Pool.

Q. How do you know that?

A. All those papers were taken. They requested that they be brought. I trusted Chief Pool.

Q. You entrusted or trusted?

A. I trusted. They were in the police department and the County Grand Jury asked for the papers when they were investigating the case.

Q. When was the last time you saw this original?

(Testimony of Al Ferguson.)

A. I wouldn't know, sir, to be exact. A few days after this.

Q. Would you consider the original of this document to be an official police record?

A. It should be.

Q. Do you know where the original is today?

A. No, sir.

Q. While at the Oxford Club do you know if at any time Coite Gaither left your company and went to the men's room?

A. I wouldn't know that, sir.

Q. Do you know if at any time while at the Oxford Club he was ill? A. No, sir.

Q. You didn't know that?

A. He wasn't ill to my knowledge. [213]

Q. Do you know if he had occasion to vomit at sometime during the period of time he was in the Oxford Club?

A. No, I never seen him. I could see if he went to the rest room.

Q. If he went to the rest room, it would be certainly in the company of an officer, wouldn't it?

A. Well, he couldn't leave the rest room.

Q. On the evening of February 28, 1956, I believe you testified that certain officers went out to pick up the slot machines, is that correct?

A. That's right, sir.

Q. Who were those officers?

A. Chief Pool, Vic Carlson and Gaither.

Q. Do you know if there was another trip made

(Testimony of Al Ferguson.)

that evening while you were there by any of these officers? A. Not to my knowledge.

Q. Do you know if Vic Carlson and officer Clifton made a trip that evening?

A. Not that I recall.

Mr. Babcock: Nothing further, your Honor.

Cross-Examination

By Mr. Matteucci:

Q. Mr. Ferguson, the evening of February 28th was Mr. Clifton in the police station, do you know?

A. I believe he was in there, not being with us when we went after Gaither. I am pretty sure he was there most of the [214] evening.

Q. And at the time Chief Pool and Detective Carlson took Gaither out to receive the slot machines, Mr. Clifton wasn't with them?

A. No, he didn't go with them. There were only three of them.

Mr. Matteucci: That is all.

Mr. Watson: No further examination.

(Witness excused.)

BILLY RICHARD LEEDS

a witness on behalf of the Defendant Pool, being duly sworn, testified as follows:

Direct Examination

By Mr. Watson:

Q. Will you state your name please?

A. Billy Richard Leeds.

(Testimony of Billy Richard Leeds.)

Q. Where do you live?

A. Route 1, Box 264.

Q. Mr. Leeds, where are you employed?

A. With the United States postoffice.

Q. Here in Las Vegas? A. Yes.

Q. Where were you employed on or about February 27th and February 28th, 1956?

A. At the North Las Vegas police department.

Q. You were an officer of that department?

A. Yes, sir.

Q. Do you recall whether or not you were on duty on February [215] 27, 1956?

A. Yes, I was.

Q. What hours were you on duty during that date?

A. From seven a.m. in the morning until three p.m. in the afternoon.

Q. What particular job were you fulfilling that day? A. I was desk officer.

Q. Desk officer in the station? A. Yes, sir.

A. At any time during those hours, seven a.m. to three p.m., did you leave the station?

A. No.

Q. You did not leave for lunch?

A. No.

Q. Do you know Coite M. Gaither, Jr.?

A. Yes.

Q. Do you know Ray Lewis Sage, Jr.?

A. Yes.

Q. Did you have occasion to see Mr. Ray Lewis Sage, Jr., on February 27, 1956?

(Testimony of Billy Richard Leeds.)

A. Yes, sir, I did.

Q. What time, approximately, did you first see Mr. Sage?

A. Approximately nine in the morning.

Q. And where did you see him?

A. When he was brought to the station. [216]

Q. Do you know, of your own knowledge, how long Mr. Sage remained in the station after having arrived at nine a.m. on February 27th?

A. Until about two thirty or three in the afternoon that day.

Q. He did not depart at any time between nine a.m. and about two thirty?

A. No.

Q. Was he under your personal observation during that entire time?

A. I couldn't see him all the time, but I could see him, due to the situation of the different offices.

Q. Could he have left the station without your knowledge?

A. Well, he probably was taken to the back of the room, to the men's room, without my knowledge, with an officer.

Q. I mean could he have walked clear out?

A. No, not leave the place without my knowledge.

Q. Did you observe at any time Mr. Sage being physically mistreated?

A. No, sir, I did not.

Q. Did you at any time observe any duress or coercion being applied to Mr. Sage for making of a

(Testimony of Billy Richard Leeds.)

statement? A. No, there was no——

Mr. Babcock: We object, your Honor, there is insufficient foundation for such an answer from this witness.

Mr. Watson: I will withdraw the question. [217]

Q. Did you have occasion to see Mr. Coite M. Gaither on that date, February 27th?

A. Yes, sir, I did.

Q. When did you first see Mr. Gaither?

A. At about nine o'clock in the morning.

Q. And where did you see him?

A. When he was brought to the station with Sage.

Q. And how long did he remain in the police station, if you recall?

A. He was there until approximately twelve thirty, when he left the station for approximately an hour and he was brought back.

Q. By whom was he accompanied from the station? A. Mr. Pool and Victor Carlson.

Q. Did you see Coite M. Gaither at anytime after he left the station?

A. Not until he came back in.

Q. But you were there when he returned?

A. Yes, sir, I was.

Q. About an hour later? A. Yes, sir.

Q. Who accompanied him when he returned?

A. Mr. Pool and Victor Carlson.

Q. Did you observe any excess amount of dirt or sand or gravel on Mr. Gaither's clothes when he returned? [218]

(Testimony of Billy Richard Leeds.)

Mr. Babcock: Objected on the ground not sufficient foundation.

Mr. Watson: I will withdraw the question.

Q. Did you have occasion to observe the appearance of Mr. Gaither as he left the station with Mr. Carlson and Mr. Pool? A. Yes, sir.

Q. Did you have occasion to observe the appearance of Mr. Gaither when he returned with Mr. Carlson and Mr. Pool? A. Yes, sir, I did.

Q. Did you notice any significant change in the appearance of Mr. Gaither from the time he left until the time he returned?

A. No, sir, I did not.

Q. By that I mean change in what you observed, his face and also his clothing?

A. The only thing I noticed, he had taken his tie and loosened.

Q. You told us that you recall that Mr. Sage left the police station on that day, February 27, 1956, a time between two-thirty and three p.m. Do you recall with whom he left?

A. I beg your pardon—will you repeat the question?

A. I say you testified that Mr. Sage left the police station on February 27th? A. Yes, sir.

Q. Between two-thirty and three p.m.?

A. Yes, sir.

Q. Do you recall who went with him? [219]

A. Captain Clifton and Mr. Carlson, I believe, I am not sure.

Q. And when did you, yourself, leave?

(Testimony of Billy Richard Leeds.)

A. I left at three p.m., sir.

Mr. Watson: That's all.

Cross-Examination

By Mr. Matteucci:

Q. Mr. Leeds, do you know how Mr. Gaither was dressed at the time he left the North Las Vegas police department?

A. He was wearing a dark blue suit, shirt and tie.

Q. And he was meticulously dressed, is that right? A. He had been all day.

Q. When he came back, did you notice any dirt on his pants? A. No, sir, I did not.

Q. Do you think you would have noticed any dirt, had he had dirt on his pants?

A. I think I would.

Q. You say, Mr. Leeds, drawing attention to Mr. Sage, you say he left with Mr. Clifton and Mr. Carlson between two-thirty and three p.m. that afternoon, is that correct? A. Yes, sir.

Q. Do you know where he was going?

A. They were taking him to the Henderson jail.

Q. About the 27th of February, 1956, Mr. Leeds, was the North Las Vegas department in an area, a closed area of a small nature?

A. Yes, sir, it was. [220]

Q. Could you describe to the jury about how big that police department was?

A. Yes, sir. My office was approximately twelve

(Testimony of Billy Richard Leeds.)

feet wide by eighteen feet long, eighteen to twenty feet long, situated right next to the Chief's office, which was approximately three times as large. There was a door or an opening—there was no door—there was an opening separating the two offices and my desk was situated right by the door leading into the Chief's office, so that I could see that office at anytime that I looked.

Q. And were there chairs distributed around the building for prisoners and other people to sit on?

A. Yes, sir, there were. There were four or five chairs in there.

Q. I believe, Mr. Leeds, you testified Mr. Sage may have gone in the back room to the rest room, but he could not have left the office without your noticing, is that correct?

A. That is correct, sir.

Q. Do you know where Mr. Sage was sitting in that police station?

A. Yes, sir, I do. He was sitting in the Chief's office on the right side of the room, up against the wall. That was directly—well, I would have to go through the door and look to the right in order to see him.

Mr. Matteucci: That's all. [221]

Cross-Examination

By Mr. Babcock:

Q. Mr. Leeds, when did you commence your employment as police officer with the North Las Vegas police department?

A. January 13, 1956.

(Testimony of Billy Richard Leeds.)

Q. And who hired you?

A. Captain Clifton.

Q. And when did your employment terminate as police officer? A. April 30, 1956.

Q. How long had you known Captain Clifton prior to your employment?

A. I had never known him before, sir.

Q. On February 27, 1956, isn't it fair to say, Mr. Leeds, that there was a considerable amount of commotion at the North Las Vegas police department?

A. Not considerable, no, I wouldn't say that.

Q. Weren't there a number of prisoners——

A. No, sir.

Q. ——being brought back and forth and in and out of the police station during that day, during your period of duty?

A. I don't remember.

Q. You don't remember? A. No, sir.

Q. How many times would you say that Chief Pool came and went while you were on duty that day?

A. I can't say how many times he came and went. [222]

Q. When was the first time when you observed Chief Pool leave?

A. He came in first about ten o'clock in the morning the first time I saw him. He left about an hour or so later.

Q. Did you observe with whom he left?

(Testimony of Billy Richard Leeds.)

A. He left with no one.

Q. Did he go out the front or back door?

A. Front door, right in front of my desk.

Q. What were your duties on that day?

A. I was desk officer and radio dispatcher.

Q. That is desk sergeant?

A. Well, I wasn't sergeant.

Q. You were booking prisoners?

A. Yes, sir.

Q. Did you have occasion on that day to book Ray Lewis Sage?

A. I didn't do the booking myself. There were secretaries that took care of that.

Q. Was it done at the time Sage was brought into the police station?

A. I don't know.

Q. Was Coite Gaither booked at the time he was brought into the police station?

A. I don't know.

Q. Do you know Ramona Wolf?

A. Yes, I do.

Q. Was she on duty that day? [223]

A. Yes, she was.

Q. She has testified, Mr. Leeds, that she observed at one period of time during the day, Chief Pool, Vic Carlson, Captain Clifton and Ray Lewis Sage in an automobile. Did you have occasion to make such an observation?

A. No, sir, I did not.

Q. Why was that?

A. I didn't see Sage leave that office. Sage did

(Testimony of Billy Richard Leeds.)

not leave that office. I know that Carlson and Chief Pool were in and out that office quite often.

Q. What office?

A. The main office in the police department. When the Chief took Gaither out for about an hour, Captain Clifton stayed in the office and Sage was there in the office with him at the time, and I would say it was about an hour that they were gone and Sage was right there with Clifton in that office.

Q. During the course of that day and while on duty, did you have occasion to observe any officer take Coite Gaither out of the station and to another police car?

A. The only officer I saw take Gaither out was Pool and Carlson.

Q. And where did they take him, do you know?

A. I do not know, sir. All I know that they were gone for about an hour.

Q. Now, your testimony is that Ray Lewis Sage remained in the [224] police station from the time of his arrival at nine o'clock until about two-thirty or three o'clock in the afternoon, is that correct?

A. Yes, sir, he did.

Q. Was he given any food during that period of time?

A. No, I don't think so.

Q. What was he doing during that period of time?

A. Sitting in a chair in the Chief's office.

Q. Just sitting all that period of time?

A. Yes, sir. Captain Clifton questioned him for

(Testimony of Billy Richard Leeds.)

an hour or so, then he let him sit because he didn't get any satisfaction, I suppose. I didn't listen to the questioning.

Q. Do you know if Ray Lewis Sage was under arrest at two-thirty that day?

A. They had been arrested that morning.

Q. By whom?

A. Carlson and Officer Frankford.

Q. Do you know if they were booked after the arrest?

A. They should have been. I did not watch the proceedings in the office, but if they weren't I wouldn't know.

Q. If you didn't watch the proceedings in the office, perhaps there are a lot of other things you did not watch, is that a fair assumption?

A. Yes, sir.

Q. And is it a fair assumption that there were a lot of people [225] that could have come in and gone out of that police station while you were attending to other types of work?

A. Yes, but every person who came in and out of that office had to pass my desk.

Q. Are we to believe that you were sitting at your desk—what were the hours of your duty?

A. Seven to three. No, not always at my desk.

Q. You were moving about the police station?

A. Well, it wasn't my usual way.

Q. You could have?

A. Yes, when I went to the back room.

Q. You did go to the back room?

(Testimony of Billy Richard Leeds.)

A. A couple of times.

Q. So when you went to the back room it is fair to assume that people could have come in and out that door past your desk without your discovering them?

A. Yes, sir.

Q. Now, it is your testimony that Ray Lewis Sage remained at the police department from nine until two-thirty or three in the afternoon?

A. Yes, sir.

Q. And then he left?

A. Yes, sir.

Q. With whom?

A. With Clifton and Carlson and Gaither. [226]

Q. All three were in the car?

A. Yes, all went out and got in the police car and left.

Q. In one car?

A. Yes, sir.

Q. What car was it, do you know?

A. I don't recall, sir. It was a police car, an official car.

Q. Did you observe all four of them enter the car?

A. I saw them all gather around the car to get in. They might have taken another car afterward.

Q. What is that?

A. They might have taken two cars, I don't know. I saw them all gather around one car and at that time we were right in the midst of changing shifts and I didn't pay too much attention how they left the station, although I know they all went out at this time together to get in the car and leave for Henderson.

(Testimony of Billy Richard Leeds.)

Q. And it is your belief all four of them left in one car? A. Yes, sir, it is.

Q. Did you know where they were going?

A. I presumed Henderson. I heard they were taking him to the Henderson jail because of the fact there were no openings in the Las Vegas City Jail or County Jail, where we usually took the prisoners.

Q. What time of day was it that Gaither and Sage were booked at Henderson? [227]

A. I have no idea. I was off duty at the time they got there. They left our station between two-thirty and three-thirty.

Q. En route to Henderson? A. Yes.

Q. Did you have occasion to check the booking records on their return to determine how long they had been incarcerated at Henderson?

A. No, sir, I did not.

Q. But they were filed at the Henderson city jail, is that right?

A. Yes. May I say something, sir—you asked me if they were filed at the Henderson jail. I presume they were. I don't know if they were or not.

Q. Did you observe how Sage was dressed when they first came into the station at nine o'clock?

A. Shirt and trousers. I don't remember the colors, but I believe a light shirt.

Q. Did you have occasion to observe the physical appearance of all prisoners that come in and out of the North Las Vegas police station?

(Testimony of Billy Richard Leeds.)

A. Well, I trained myself a little bit at the time to look at people, so I could recognize them again if I saw them.

Q. By the face? A. By the face.

Q. But you are not particularly interested in what they are [228] wearing, isn't that a fair statement? A. Well, no, I don't think so.

Q. Who were some of the other people in the jail that day, the North Las Vegas police department?

A. Officers were in and out. Sgt. McKrug was there that morning; officer Crawford was there, but they were both on grave-yard shift and they left early that morning, after about nine o'clock, and I don't recall who the officers were that were on duty during the day shift.

Q. You don't recall?

A. No, sir, I do not. I am trying to think, but I can't think of his name. I know who he is, but I can't think of his name.

Q. Did you observe any other prisoners?

A. I never observed any other prisoners, no. Yes, Fritzel was brought in with Gaither and Sage.

Q. Do I understand your testimony correctly that Gaither and Sage were brought in together, is that correct? A. Yes.

Q. They were brought in together?

A. I believe so. I am not sure. It was right close to the same time if they were brought in separately.

Q. Who brought in Sage and Gaither?

(Testimony of Billy Richard Leeds.)

A. Carlson and officer Crawford brought them in that morning at nine o'clock.

Q. Together, is that your testimony? [229]

A. I will say Gaither might have been brought in just a little later, I don't know who he was brought in with if he wasn't brought in at that time.

Q. According to your testimony Gaither was brought in about nine o'clock also?

A. Yes, sir.

Q. And he stayed at the station for how long?

A. Twelve to twelve-thirty, I believe, something like that.

Q. What was he doing during that period of time?

A. Sitting in the corner in the Chief's office in a chair.

Q. Doing what? A. Nothing.

Q. Just sitting? A. Yes, sir.

Q. Was he under arrest at that time?

A. I presume so, yes.

Q. Well, do you know?

A. No, sir, I did not see the arrest made.

Q. As a booking officer, it would be your responsibility?

A. I wasn't actually booking officer. I was radio dispatcher and taking care of people that came in the front office. We had secretaries that did the actual booking at the time, such as Ramona Wolf, she was there at the time and she was booking, taking care of the actual booking.

(Testimony of Billy Richard Leeds.)

Q. Ramona Wolf also did dispatching, didn't she? [230] A. Yes, at times.

Q. And she did dispatching on February 27th, did she not.

A. When I stepped out of the office she might have.

Q. Someone had to?

A. Yes, someone has to be on the radio at all times.

Q. And Ramona Wolf, that was part of her duty, was it not?

A. No, she was hired as a secretary.

Q. But she handled radio dispatching?

A. She did handle radio, yes, only once in awhile.

Q. You wouldn't call Ramona Wolf a booking sergeant, would you? A. No, sir.

Q. Would that be her duty, to book and arrest prisoners?

A. No, sir, I don't think it would be. There was a secretary on that usually did the booking and another secretary on that did the typing and booking, typing up of the booking report.

Q. As a radio dispatcher, was it your duty to handle the radio log?

A. Yes, sir, it was.

Q. During your duty shift?

A. During my duty shift, yes, sir.

Q. Were you handling the radio log from February 27, 1956, going into the first two or three weeks of March, 1956? A. Yes, sir.

(Testimony of Billy Richard Leeds.)

Q. May I ask you, Mr. Leeds, did you have occasion to log car [231] No. 10 from Las Vegas, Nevada, to Los Angeles, California and return in the fore part of March, 1956?

A. No, sir.

Q. Did you have occasion, Mr. Leeds, to log police car No. 10 of the North Las Vegas police department, from Las Vegas, Nevada to Baker, California and return the fore part of March, 1956?

A. No, sir.

Mr. Babcock: Nothing further, your Honor.

Mr. Watson: No further questions.

(Jury admonished and morning recess taken at 11:05.)

11:20 A.M.

(Defendants present with counsel and government counsel present. Presence of the jurors and alternate juror stipulated.)

ARTHUR DAVIDSON

a witness on behalf of Defendant Pool, being duly sworn, testified as follows:

Direct Examination

By Mr. Watson:

Q. You are the same Lt. Arthur Davidson who previously testified in this case?

A. Yes, sir.

Q. And you are the official custodian of the records of the North Las Vegas police department?

(Testimony of Arthur Davidson.)

A. Yes, sir.

Q. Lt. Davidson, did you receive, on behalf of Mr. Pool, a subpoena duces tecum to produce certain documents today? [232]

A. I did.

Q. Will you please show me the first document which you have?

A. This is a complete radio log from February, 1956, of the North Las Vegas police department.

Q. Do you have there in the log the portion of it which relates to the log notes of February 27, 1956?

A. Yes, sir.

Q. Will you please take out those pages?

A. Begins at 12:02 a.m. on the morning of the 27th, runs through to 11:58 p.m. the night of the 27th.

Mr. Watson: May I ask that the clerk mark for identification the eight sheets of paper heretofore designated by Lt. Davidson.

Q. Lt. Davidson, I show you what has been marked, for the purpose of identification, Defendant's Exhibit E, and ask you to examine it, eight pages so designated collectively, and tell me whether or not it is the record which you have just testified as being a portion of official records of the North Las Vegas police department?

A. It is; yes, sir.

Mr. Watson: At this time, if the Court please, the Defendant Pool offers in evidence Defendant's Exhibit E.

Mr. Babcock: No objection, your Honor.

(Testimony of Arthur Davidson.)

The Court: The offer will be received in evidence as Defendant Pool's Exhibit E. [233]

Q. If you please, Lieutenant, will you please examine this defendant's Exhibit E and inform the Court and the jury if such information appears, who is stated to be in charge of the desk at seven a.m., February 27, 1956?

A. At seven a.m., February 27, 1956, the desk officer was Leeds.

Q. And will you please make a further examination and tell whether or not the logs which you now hold show the time of termination of duty of Desk Officer Leeds on that date, February 27th.

A. At three p.m. February 27, 1956, Desk Officer Hume took over.

Q. And does the exhibit show who was desk officer immediately prior to that time?

A. Desk Officer Leeds.

Mr. Watson: Thank you, Lieutenant. Pass the witness.

Direct Examination

By Mr. Matteucci:

Q. Mr. Davidson, you were requested by subpoena duces tecum to bring the original statement signed by Ray L. Sage, dated February 28, 1956, is that correct? A. That is correct.

Q. You brought that with you?

A. There is no such statement in the files.

Q. In the files of the North Las Vegas police department? A. No, sir. [234]

(Testimony of Arthur Davidson.)

Mr. Matteucci: Your Honor, at this time the defendants wish to submit this photostatic copy of the original into evidence, the original being gone.

The Court: The Court will reserve its ruling.

Cross-Examination

By Mr. Babcock:

Q. Lt. Davidson, you were asked if you would examine the files to determine if you had the original of a statement which was shown to you as defendants' Exhibit B for identification. May I ask of you at this time, have you examined the files and records of the North Las Vegas police department, with reference to the investigation and the disposition of the matter involving Ray Lewis Sage and Coite Gaither?

A. Yes, sir.

Q. Were you able to find in the official records or files of your department any statements of either Ray Lewis Sage, Jr., or Coite Gaither, Jr.?

A. No, sir, there was no statements at all.

Q. Directing your attention to defendants' Exhibit E, I invite your attention to a page of this radio log at a scheduled time of 10:59 a.m. on 2/27/56. Would you translate that particular entry?

A. Start with the number of car, 14—"Have a car meet me at Grande Court Unit 15. Time 10:59 a.m."

Q. On that same page can you determine if a police car was dispatched to that address, Unit 15, Grande Court, or [235] responded to that call?

(Testimony of Arthur Davidson.)

A. Not on this page, no.

Q. Directing your attention to page 2 of the radio log, defendants' Exhibit A, I will ask you to translate the entry under the time of 2/27/56, 8:44 p.m.

A. 8:44 p.m., 2/27/56. The message was from 509, call Las Vegas police station, 2517, which is Henderson police station. Message was: "What was name of 15? Need Medical care." Answer: "Ray L. Sage, 3:44 a.m." Fifteen means prisoner.

Q. Directing your attention, Officer Davidson, to date February 27, 1956, would you examine this log for the entries between the time of two o'clock p.m. and four o'clock p.m., and state if any entries were made for dispatch of the police car from North Las Vegas police department to Henderson city jail?

A. Yes, sir—disregard this—no, sir, there was no, between two and four p.m., February 27th, there was no car dispatched to the Henderson jail.

Mr. Babcock: That's all.

Redirect Examination

By Mr. Watson:

Q. Now, Lt. Davidson, these are the radio logs that you produced, are they not? A. Yes.

Q. They reflect calls made in and out of the station by radio? A. Yes, sir.

Q. And they do not necessarily reflect activities in the station [236] that had nothing to do with radio calls, is that correct?

(Testimony of Arthur Davidson.)

A. If radio wasn't used, it wouldn't reflect on this log.

The Court: Will you please return to the chair, Mr. Davidson?

Q. Mr. Davidson, on the 27th of February, 1956, and immediately before that time, you were the official custodian of all of the records of the North Las Vegas police department?

A. No, sir, I was not at that time.

Q. When did you take over that particular duty?

A. October of 1956.

Q. And you said, in response to subpoena issued in this matter, you have searched your records, as you now have them, for the purpose of obtaining the original statement made February 28, 1956, purportedly made in the handwriting of Ray Lewis Sage, Jr.?

A. Yes, sir.

Q. I show you this photostatic copy and ask you if you have ever seen that before, or have you seen any document at anytime, during the period in which you were official custodian of the official records of the North Las Vegas police department?

A. No, sir, I have seen nothing similar to this.

The Court: Do you desire any questions, counsel? [237]

Mr. Watson: No, your Honor.

(Witness excused):

The Court: Let the record show that the Defendant Pool rests his defense in chief, subject to the

right to present one additional witness. The name of this witness is what?

Mr. Watson: Mrs. Phyllis Harrison.

The Court: Now, Mr. Matteucci, as counsel for the Defendant Clifton, do you have any witnesses?

Mr. Matteucci: Yes, your Honor. I would like to call Mr. George Dickerson, District Attorney.

GEORGE DICKERSON

a witness on behalf of the Defendant Clifton, being duly sworn, testified as follows:

Direct Examination

By Mr. Matteucci:

Q. Will you tell the Court your name?

A. George Dickerson.

Q. Are you the district attorney of Clark County? A. I am.

Q. Mr. Dickerson, how long have you been district attorney of Clark County?

A. Since January 1, 1955.

Q. Is the Clark County grand jury under your jurisdiction?

A. I am advisor to the grand jury when in session.

Q. Did you have occasion to advise the grand jury regarding an investigation of the North Las Vegas police department in [238] the spring of 1956?

A. With reference to what matter?

Q. With reference to the alleged beating of two

(Testimony of George Dickerson.)

prisoners held in custody of the North Las Vegas police department in February and March of 1956?

A. In part, yes.

Q. You are here in response to a subpoena duces tecum, is that correct? A. I am.

Q. We were advised earlier this morning, in testimony by another witness, that during the course of this investigation a statement signed by a person by the name of Ray Lewis Sage was submitted to your office to be submitted to the Clark County grand jury. I ask you at this time, Mr. Dickerson, if you have brought with you the original of the statement signed by Ray Lewis Sage, dated 2-28-56, which was submitted to the Clark County grand jury at that time?

A. I can answer it in this way—I have extracted from the file relating to the case of Ray Lewis Sage duplicate original statement signed by Ray Lewis Sage with reference to the matter you refer to. Whether or not same was ever presented to the grand jury, I am not in a position to say.

Q. Do you have it with you?

A. I have duplicate original with reference to the case processed in the district court in relation to Ray Lewis Sage. [239]

Q. May I see it?

A. I beg your pardon—what date did you state?

Q. 2/28/56. Mr. Dickerson, do you have any other statements in your file signed by Ray Lewis Sage?

(Testimony of George Dickerson.)

A. I can't answer your question at this time, Mr. Matteucci. I didn't examine my file with reference to any other than requested.

Q. Do you have any other statement signed by Ray Lewis Sage dated February 28, 1956, in your file?

A. There may be. I have no knowledge at the present time. I would be happy to check in relation to the request by the subpoena duces tecum.

Q. I am asking you, do you have any other statement?

A. I have no way of knowing. All I did was to look in the file this morning for the purpose of determining if a statement of such a date was in our file, which was used in the case of Ray Lewis Sage when prosecuted for burglary. Your subpoena was what—one before the grand jury. I have no way of knowing; I didn't present this matter to the grand jury.

Q. This statement is in your file regarding the burglary?

A. That is correct.

Q. You did not bring any statements regarding investigation of the grand jury in this matter?

A. I have no way of knowing what went before the grand jury. I didn't present that myself. [240]

Q. Do you have the original of that statement?

A. If there is such a statement, it would be part of the files of the district court with reference to activities of the 1956 grand jury.

Q. You don't have it?

A. I don't have any original statement. I have

(Testimony of George Dickerson.)

duplicate original of the statement submitted to our office.

Q. Do you have a statement similar to this, the original of this statement?

The Court: When you say "this," what do you refer to?

Q. This statement signed by Ray Lewis Sage, Jr., witnessed by Al Ferguson, police commissioner, and Victor Carlson, containing four pages, in the handwriting of Ray Lewis Sage. Do you have the original of that?

The Court: Is that Exhibit B?

Mr. Matteucci: Yes, your Honor.

A. Mr. Matteucci, I would be glad during recess to examine the files in my office. I have no independent knowledge at this time of the existence of such a statement in our files.

Mr. Matteucci: At this time, your Honor, defendants offer to place this into evidence again, on the basis due diligence has been shown to obtain the original. We are not aware of the original, have never seen it. This is the only evidence of this statement, which has been identified by Ray Lewis Sage as to the sheets and Al Ferguson as to his signature [241] and Vic Carlson as witness.

The Court: I would like to see the subpoena duces tecum with reference to the Witness Dickerson.

Mr. Dickerson: I was never served a subpoena.

Mr. Matteucci: This subpoena was typewritten by the clerk of the district court and the original taken to the marshal's office. I have a copy.

(Testimony of George Dickerson.)

The Court: There must be some confusion between this witness and what counsel sought to require. This subpoena reads insofar as it is pertinent: "Bring with you the original statement signed by Ray Lewis Sage which was submitted to the Clark County grand jury as to the North Las Vegas Police Department." Now you have answered that, Mr. Dickerson, in this manner, something to the effect that, as I understand it, you, as district attorney and the custodian of the criminal files, as distinguished from the grand jury proceedings, do not have in your files an original statement signed by Ray Lewis Sage, is that right?

Mr. Dickerson: Your Honor please, may I explain that? This matter was presented to our grand jury, but presented by two deputies in my office. I was engaged in a murder trial at the time. I have been informed that no statement was submitted. The statement that I have produced here is a statement, which [242] is a duplicate original, signed by Ray Lewis Sage, Jr., which was in the files of the case of the State of Nevada vs. Ray Lewis Sage, having to do with the crime of burglary, for which he was prosecuted and convicted. Now, what may have gone before the grand jury and what may be in their files, in relation to the grand jury, I am in no position to state at this time, and as I informed counsel, I would be only too glad, during the recess at noon to check with deputies handling this matter before the grand jury and search the files and see if there is such a statement Mr. Matteucci refers to.

(Testimony of George Dickerson.)

The Court: Now, will you let me see the so-called duplicate which you brought from your office. I will say frankly the Court is confused, to say the least. May I see Exhibit B again. Mr. Matteucci, perhaps you can help the confusion of the Court or otherwise shed light on this. The document which Mr. Dickerson brought and handed to you, as being a duplicate copy of the statement made by Ray Lewis Sage, Jr., February 28, 1956, in typewritten form, is a different statement, or is it the same identical statement purporting to be made and shown on defendants' B for identification?

Mr. Matteucci: I have not read the statement Mr. Dickerson presented thoroughly word for word, but from what I have read, it appears to be a different statement entirely. [243]

The Court: Certainly one is a carbon copy of an original typewritten statement, whereas the other purports to be a photostatic copy of long-hand statement, so apparently they are just not the same statements.

Mr. Matteucci: Thank you. That is all I have.

The Court: Now, do I understand this witness will be back after the noon hour and advise the Court and the jury whether or not he found any statement, after having made further search?

Mr. Matteucci: Yes, your Honor, I excuse the witness with that reservation.

Mr. Babcock: May I make this further observation of the Court—the government requests Mr. Dickerson to bring with him any and all statements

(Testimony of George Dickerson.)

of Ray Lewis Sage or Coite Gaither that are in his possession or custody which may relate either to the criminal matter or to statement to the grand jury.

The Court: Very well, Mr. Dickerson, you may be excused.

(Jury admonished and noon recess taken at 12:05 p.m.)

1.30 P.M.

(Defendants present with counsel and government counsel present. Presence of the jurors and alternate juror stipulated.)

The Court: Mr. Watson, are you prepared to put on the witness mentioned? [244]

Mr. Watson: I am, your Honor.

MRS. PHYLLIS LOUISE HARRISON

a witness on behalf of the Defendant Pool, being duly sworn, testified as follows:

Direct Examination

By Mr. Watson:

Q. Will you state your name, please, and address?

A. Phyllis Louise Harrison; 1807 North Fifth.

Q. Where were you residing in February, 1956?

A. 2560 North Main.

Q. What was your occupation?

A. I rented the Grande Motel.

Q. And you lived in the Grande Motel?

A. Yes, sir.

(Testimony of Phyllis Louise Harrison.)

Q. Do you know Ray Sage, Jr.?

A. Yes, sir.

Q. Do you know Coit Gaither, Jr.?

A. Yes, sir.

Q. Do you have any recollection of fights which concerned those two people on Sunday, the 19th of February, 1956?

A. On Sunday night, yes, sir.

Q. About what hour of the night?

A. Well, it was practically all night, but it came to a climax when I woke up in the morning.

Q. Will you please tell the Court and jury what occurred on that day?

A. Well, they had been creating a disturbance, along with quite [245] a few other boys, all night and I had repeatedly asked them to quiet down and they didn't pay any attention to me, so about four o'clock in the morning they were fighting in the driveway, so I had to call the North Las Vegas police department.

Q. By fighting, do you mean having hard words?

A. No, sir, they were using their fists.

Q. Would you describe it as very mild exchange of blows or severe?

A. Well, they were hitting pretty hard blows. I don't think the fight was anything mild. I think it was really a fight.

Q. Did you see either of the two people I have named, Sage or Gaither, anyplace?

A. Yes, sir, I saw Mr. Sage. I didn't see Mr. Gaither.

(Testimony of Phyllis Louise Harrison.)

Q. You saw Mr. Sage receive blows?

A. Yes, sir.

Q. Were they hard blows?

A. I thought they were, yes.

Q. Could you say approximately how many times you saw him hit?

A. No, sir, I couldn't, because I turned as soon as I saw what was happening and went back and called the police.

Q. Could you say what part of the body you saw him being hit?

A. No, I really couldn't.

Q. Did you see him kicked in any way?

A. No, sir, saw blows.

Q. You just saw blows with the fist? [246]

A. Yes, sir.

Mr. Watson: Pass the witness.

Mr. Matteucci: I have no questions.

Mr. Babcock: No questions, your Honor.

The Court: You may be excused. The Defendant Pool's case now stands submitted, is that right?

Mr. Watson: That is correct.

THOMAS N. FISHER

a witness on behalf of the Defendant Clifton, being duly sworn, testified as follows:

Direct Examination

By Mr. Matteucci:

Q. State your name, please, and address.

A. Thomas N. Fisher; 2607 East Charleston.

(Testimony of Thomas N. Fisher.)

Q. Where are you employed?

A. Fremont Hotel.

Q. Where were you employed in the month of February, 1956?

A. North Las Vegas police department.

Q. When did your employment with the North Las Vegas police department terminate?

A. July 16th.

Q. Did you have occasion, on the 27th of February, 1956, to be detailed to guard a prisoner by the name of Ray Lewis Sage? A. I did.

Q. Do you know Ray Lewis Sage?

A. Yes, sir.

Q. Will you tell the Court where you guarded such prisoner? [247]

A. At the Rosa de Lima Hospital, Henderson.

Q. Henderson, Nevada? A. Yes, sir.

Q. Did you know Mr. Sage personally before that time?

A. I had seen him quite a few times, yes, sir. He was stationed in the same squadron I was at Nellis Air Force Base.

Q. Would you say that you had a speaking acquaintance with Mr. Sage before this proceeding in February?

A. No, sir, I didn't. I had seen him in the squadron, that is all.

Q. Did you have occasion to talk to Mr. Sage at the time you were detailed to guard him in the hospital at Henderson, Nevada?

A. Yes, sir, I did. I picked him up at the Hen-

(Testimony of Thomas N. Fisher.)

derson police department and transported him to the Rosa de Lima Hospital. At the hospital he was checked in and given a room and issued some clothes. At that time Sage looked at me and stated, "If I knew they were going to put a guard on me, I would never have come to the hospital."

Q. Did he tell you why?

A. No, sir, not specifically.

Q. Did he say anything to intimate why?

A. He said——

Mr. Babcock: Just a moment—I think this calls for conversation and I object to questions that might resolve in conclusions of this witness. [248]

The Court: Ask the question in a different form.

Q. What did he tell you, Mr. Fisher?

A. He stated, "If I knew they were going to put a guard over me I never wanted to come to the hospital."

Q. Did he say why?

A. He said he had been drinking.

Q. Did you have any further conversation with him at that time?

A. No, sir. He went to bed at that time. I had no more conversation with him until the next morning.

Q. Did he tell you anything next morning?

A. He was getting X-rayed.

Mr. Babcock: We object—on foundation laid as to who was present, time and place.

The Court: I think the question was, "Did he

(Testimony of Thomas N. Fisher.)

tell you anything next morning." The answer is yes or no.

A. Yes, sir.

Q. Did you transport Mr. Sage back to the North Las Vegas police station that next day?

A. No, sir.

Mr. Matteucci: That's all, your Honor.

Cross-Examination

By Mr. Babcock:

Q. Mr. Fisher, did you have occasion to see the physical appearance, primarily the chest and abdomen, of Sage while he was at the Rosa de Lima Hospital on February 27, 1956? [249]

A. No, sir; I do not recall.

Q. You didn't see his body?

A. No, sir. When I arrived at the station he was ready to go to the hospital and there he changed clothes in the hospital room. Clothes were issued there.

Mr. Babcock: Nothing further.

(Witness excused.)

MR. DICKERSON

having been previously sworn, testified on further:

Direct Examination

By Mr. Matteucci:

Q. Mr. Dickerson, have you examined your records? A. I have.

(Testimony of George Dickerson.)

Q. Of the grand jury investigation. Did you find the original of the statement, defendants' proposed Exhibit B, that you looked at this morning?

A. I might explain, Mr. Matteucci, at the time of this investigation before the Clark County grand jury, investigation involved a recall petition of North Las Vegas police. In checking the files with respect to the case of Sage and Gaither, I found nothing in relation to the statement to which you referred here. I checked the records in the clerk's office, records of exhibits that were admitted, and on the possibility that perhaps another B was in the records of the clerk's office, I consulted both deputies who presented the matter, the court reporter who took and transcribed the matter and all recall statement [250] referring to the existence of such statement given, but no such statement appeared to the grand jury. I did then go into the files in my office with reference to investigating the recall petition of the North Las Vegas police, then before the grand jury, and found a statement that purports, or looks to be identical with the statement to which you refer as defendants' Exhibit B. May I hand that to you at this time.

Q. Mr. Dickerson, has this statement been in your file all the time since it was submitted to your office?

A. All I can say, I assume so, Mr. Matteucci. It was found in the file. It was not in reference to the case here. As I explained, it was in the file, so I must assume it was in the file at all times from

(Testimony of George Dickerson.)

presentation to the Clark County grand jury until this date.

Q. Mr. Dickerson, I hand you this photostat and tell me, does that appear to be the same—does the photostat appear to be a copy of the original statement?

A. I would say that it is a photostat of the original that I have in my office.

Mr. Matteucci: At this time, your Honor, I am going to submit the original of defendants' proposed Exhibit B for the purposes of identification.

The Court: You wish to identify the original now or now offer it in evidence?

Mr. Matteucci: I wish to identify it and put the original [251] in evidence.

The Court: Any objection to the original?

Mr. Babcock: I would like to see it, your Honor. I am sure there is no objection to it. We have no objection to the original, defendants' Exhibit F, going into evidence, your Honor.

Mr. Matteucci: Your Honor, this is just the original of proposed Exhibit B.

The Court: You want to withdraw B?

Mr. Matteucci: I will withdraw defendants' Exhibit B.

The Court: The offer will be received in evidence and will be marked Exhibit B in lieu of the Exhibit B heretofore presented for identification.

Mr. Matteucci: That is all I have, your Honor.

(Testimony of George Dickerson.)

Cross-Examination

By Mr. Babcock:

Q. Mr. Dickerson, I believe you testified this morning that you had participated in part in the matter of presentation of this matter to the Clark County grand jury. What did you mean when you said in part?

A. I was not present during any time when the evidence was submitted. I was present outside after the conclusion of the matter. Questions as to the legal problems involved, as to what crimes, if any, could be determined by the grand jury were asked of me, at which time I informed the grand jury that it was without jurisdiction to entertain any action in this regard, in that [252] the evidence adduced constituted at the most a misdemeanor offense; that the grand jury is an arm of the district court and can return an indictment only on matters tried with the district court.

Mr. Watson: I think Mr. Dickerson's legal opinion in the matter of the State law of Nevada in the matter of the grand jury is not proper at all, as being prejudicial and should be stricken.

The Court: Let me make this very obvious observation. Counsel are not permitted to sit idly by and allow inadmissible matter to go into the record and thereafter gamble on the chance of it being favorable or unfavorable and moving to strike. They are required to make objections to questions

(Testimony of George Dickerson.)

asked. Now this Court was aware of it as soon as that question was asked, but you didn't see fit to make the objection. Objection overruled.

Q. Mr. Dickerson, from your testimony at the commencement of the afternoon session, I understand you have had an opportunity to search the files and records of your office, concerning any statements taken in conjunction with the matter relating to Ray Lewis Sage and Coite Gaither?

A. I have.

Q. I will ask you, aside from——

The Court: At this point, the Court would like to make this observation, in ruling on the motion to [253] strike. I am sure you are not under the impression the Court treats a particular line of testimony, so any time you have objections, you make them.

Q. Were you able to find any other statements made by either Gaither, Sage, or any other person, in conjunction with the matter relating to Sage and Gaither?

A. I was. I have here statements dated 27th February, 1956, 9:45 p.m., present, Mayor James B. French, M.D., J. H. Coogan, M.D.

Mr. Matteucci: The statement is already in evidence.

Q. May I ask if that statement you are presently testifying to corresponds to defendants' Exhibit A in evidence?

A. I have an exact duplicate of defendants' Exhibit A, with the exception, of course, of the notar-

(Testimony of George Dickerson.)

ial seal and the written signature appearing thereon, this being a copy thereof.

Q. Do you have any other statements?

A. I have a statement of Coite M. Gaither, alias Corky, consisting of two pages, signed by Coite M. Gaither, witnessed by E. E. Clifton and Sgt. Ball S. Smith, taken by Donna M. Worth, subject interrogated by W. G. Bull, Chief of Police.

Q. May I see it. Do you have any other statements?

A. I have what I showed to Mr. Matteucci this morning, a statement, duplicate original, of Ray L. Sage, dated February 28, 1956, witnessed by Victor Carlson and Ramona Pool.

Q. Do you have any other statements? [254]

A. I have a number of statements of individuals with reference to the offense for which the said Ray Sage and Gaither were prosecuted in the district court, with reference to burglary, but no statements with reference to the alleged brutality.

Q. I hand you defendants' Exhibit D in evidence and ask you to examine this exhibit and determine, from a search of your files, if you have a copy or an original of that statement?

A. I find no statement in any of the records that is identical with defendants' Exhibit D.

Q. I hand you, Mr. Dickerson, defendants' Exhibit C for identification, which purports to be official document of the North Las Vegas police department, and ask if, upon a search of the files and

(Testimony of George Dickerson.)

records in your custody and control, you have a copy similar to the same as that submitted to you?

A. I have no copy of duplicate of defendants' Exhibit C in the file with reference to the matter of Coite M. Gaither or Ray Lewis Sage, or in the file pertaining to the investigation of the recall, which was found in the exhibit given to Mr. Matteucci.

Mr. Babcock: I have nothing further.

Mr. Matteucci: I have no further questions.

(Witness excused.)

Mr. Matteucci: At this time, your Honor, I would like to submit, for the purpose of going into evidence, defendants' Exhibit C for identification. I believe, your Honor, that the [255] signature on there of Mr. Carlson has been identified by Mr. Carlson, he said it was his signature, and Mr. Dickerson has no record of any other copy being in his file. It is not an official document of the North Las Vegas police department.

The Court: It certainly purports from its face to be.

Mr. Matteucci: I appreciate that, but Mr. Dickerson did not have it in his file.

Mr. Babcock: We submit it is a fugitive from the files of the North Las Vegas police department and no foundation has been laid for its admission.

The Court: From the record as it stands now, it was never a part of the file, so we have a claimed statement on what purports to be an official form, but which counsel admits himself is not an official

form, not made in the regular course of business. Do you offer that as an official document?

Mr. Matteucci: No, your Honor, just for the purpose of what it purports to be.

The Court: The offer will be received in evidence as defendant Clifton's Exhibit C.

Mr. Matteucci: At this time defendant Clifton rests.

The Court: Does the government propose to offer any rebuttal?

Mr. Babcock: We have no rebuttal, your Honor. Government rests. [256]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had and the testimony adduced at the trial of the case entitled, United States of America, Plaintiff, vs. William Cecil Pool and Edward Ellis Clifton, Defendants, No. L. V. 136, held in Las Vegas, Nevada, on Monday, Tuesday and Wednesday, the 14th, 15th, and 16th of October, 1957, and that the foregoing pages, numbered 1 to 256, inclusive, comprise a true and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, November 8, 1957.

/s/ MARIE D. McINTYRE,
Official Court Reporter.

[Endorsed]: Filed November 18, 1957.

[Title of District Court and Cause.]

JURY TRIAL

October 17, 1957

Court convened at Las Vegas, Nevada, Thursday, October 17, 1957, in the above-entitled matter, counsel for the government and counsel for the respective defendants having rested at the close of court session on October 16, 1957. The following proceedings were had:

The Court: Let the record show the presence of respective defendants with their counsel and the presence of government counsel. Let the record show further that the court has been convened, without the presence of the jury or the alternate juror, at the hour of ten o'clock. Mr. Marshal, will you observe the courtroom and state to the Court whether or not there are any members of the jury present in the courtroom?

The Marshal: No, there are not.

The Court: Very well. After having wished counsel and those of you in the court good morning, the Court wishes to take this opportunity, outside

the presence of the jury, to make [1*] this comment: The integrity of our courts is a matter of concern to every citizen, and it is especially the duty of judges to maintain the integrity of those courts. I point out to you that the administration of justice is not an exact science, but is a product of the respective conditions and all of the law. During the course of every trial incidents occur which surprise both the Court and counsel. The law provides in every instance the procedure to be followed. If it is thought by the Court or counsel that such incidents have interfered with or obstructed justice, the Court and counsel are ever solicitous of the rights of defendants in criminal matters.

Yesterday afternoon, after court had recessed, counsel for the government and counsel for the respective defendants came into chambers and advised this Court of an incident which had been reported to them. It appears that as one of the defense witnesses was about to enter the courtroom to testify, one of the government witnesses made some brief comment to that witness. At this informal discussion between Court and counsel had in chambers yesterday afternoon after recess, concerning such incident, and based upon the comment that was made, it was agreed by all of counsel that the incident was entirely harmless and that the testimony of the witness approached was in no way influenced thereby. On the basis of discussion of counsel at the conference in chambers, this Court was of the same opinion.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

This incident has been recorded in the local papers and [2] no doubt has been widely read by the community. To lay persons it may appear that some sinister motive is involved, that justice is somehow being warped, and the integrity of the court impeached. Let me point out that both the government and each of the defendants is represented by able counsel. They are here to serve the interests of their respective clients. They know the law and the legal procedure and are competent in every way to protect their respective clients. This may be, as they know, by presenting proper motion to this Court.

Now, having made this statement for the record, I ask counsel for the government if this Court has correctly reported the conference had and the matters discussed there.

Mr. Babcock: We believe the Court has, your Honor, and take no exception to your Honor's remarks.

The Court: Mr. Watson, representing the Defendant Pool, do you have any comment to make as to the Court's remarks?

Mr. Watson: The remarks of the Court, your Honor, are entirely correct, and Mr. Pool has no motion to make as a result of the incident.

The Court: Mr. Matteucci, on behalf of your client?

Mr. Matteucci: Your Honor, I concur in the remarks made by the Court and I think the Court has adequately covered the conference in your chambers yesterday, as to what took place at that

time and on behalf of the Defendant Clifton I have no motion at this time. [3]

The Court: Thank you, gentlemen. Mr. Marshal, will you now have the jurors called into the courtroom?

(Jury returned into court at 10:20 a.m.)

(Arguments and instructions to the jury.) [4]

State of Nevada,
County of Clark—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled United States of America, Plaintiff, vs. William Cecil Pool and Edward Ellis Clifton, Defendants, No. 136, at the trial held in Las Vegas, Nevada, on the 14, 15, 16 and 17 of October, 1957, and that the foregoing pages, numbered 1 to 4, inclusive, comprise a true and correct transcript of my shorthand notes taken on October 17, 1957, at 10:00 o'clock a.m., in the absence of the jury, after all evidence had been concluded on October 16, 1957.

Dated at Las Vegas, Nevada, February 6, 1958.

/s/ MARIE D. MCINTYRE,
Official Court Reporter.

[Title of District Court and Cause.]

DEFENDANT POOL'S MOTION FOR
A NEW TRIAL

Monday, November 18, 1957

Be It Remembered that the above-entitled matter came on regularly for hearing before the Court at Las Vegas, Nevada, the Honorable John R. Ross presiding, on Monday, the 18th day of November, 1957, at the hour of 3:25 o'clock, p.m., the Government being represented by Franklin P. Rittenhouse, Esq., and Howard W. Babcock, Esq., and the Defendant Pool being present and being represented by Calvin C. Magleby, Esq., of Zenoff & Magleby, Esqs., and Morton Galane, Esq., and the following proceedings were had:

The Court: This is in the matter of the United States of America vs. William Cecil Pool and Edward Ellis Clifton, Criminal Number 136. The matter before the Court at this time is the Motion for a New Trial on the part of the Defendant William Cecil Pool. Let the record further show that on the 23rd day of October, 1957, M. G. Matteucci, attorney for the defendant [1*]—strike that. Let the record show that there has been filed on November 18th Notice of Appearance of Morton Galane as attorney for the Defendant William Cecil Pool. You may proceed.

Mr. Galane: If the Court please, counsel for the government, I would like at this time, your Honor,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

to address myself to the first ground contained in the Motion for New Trial, namely, that the verdict is not supported by the evidence. Before we turn our attention to the indictment——

The Court: Pardon the interruption, counsel, but for what it may be worth, in the interests of saving time just keep in mind that the Court is very, very familiar with what the evidence was.

Mr. Galane: I shall do so, your Honor. Before we turn to the indictment it would be helpful to examine what the record shows when we construe it most favorably to the Government with regard to the obtaining of the confessions. The Government said Gaither testified that after Chief Pool beat him he was taken to the North Las Vegas Police Department; that he sat at that Police Department about five and one-half hours, from three o'clock until eight o'clock; that he admitted to nothing and he told Chief Pool just that; that after five and one-half hours Chief Pool presented to him a sack full of change and some scraps of paper. Gaither contended that he read the papers and that he then said, "I will confess." Gaither [2] further added that, "I will only confess to the burglary of three markets in North Las Vegas," and although Chief Pool desired confessions as to other burglaries Gaither refused to confess to any more than three. In short, your Honor, the evidence shows that the Gaither confession was voluntarily given not as a result of force and violence but after the lapse of five and one-half hours upon the presentation to Gaither of incriminating evidence. If that confes-

sion had been offered in a trial prosecuting Gaither for burglary it would have been admissible as a voluntary confession. This much the record shows. Now, let's turn to the Government witness, Sage.

The Court: Tell me, at this point, what is the materiality of any confession on the part of Gaither to any crime with which we are not concerned here?

Mr. Galane: The materiality is this, your Honor, in answer to the Court's question. We take the position that the indictment, whose language has been interpreted by the United States Supreme Court, required the Government to prove that the defendant deprived Gaither of his Federal Constitutional rights by obtaining the confession by force and violence. If your Honor turns to the indictment, and that has been interpreted by the Courts of our land as having a fixed meaning, the indictment specifies the manner in which the Federal Constitutional right was invaded or infringed, and that is the crux of a civil rights case. This is what the Grand Jury stated, [3] "to wit * * *"—they are now specifying the constitutional infringement—"* * * the right and privilege to be secure in his person while in the custody of anyone acting under color of the laws of the State of Nevada, the right and privilege to be immune from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws for the purpose of obtaining a confession, statement or information about an alleged offense." The Supreme Court of the United States has said that where this is the form of the indictment, in *Williams vs.*

United States, 341 U. S. 97, where this is the form of the indictment then the crux of the case, of the Government's case is that the defendant obtained a confession by force and violence depriving the prisoner of his immunity. Now that is the act. Accompanying that act, your Honor, must be a specific intent. The case of *Screws v. United States*, the Supreme Court ruling on Civil Rights Act says there must be a specific intent to deprive a defendant of that particular constitutional right. Keeping this interpretation in mind, may we turn to the testimony of the witness, Sage. Sage said that after his beating he was overnight in Henderson jail; that the next day he was brought back to North Las Vegas and that when Chief Pool presented him with the Gaither confession only at that time did Sage sign a confession. In short, the Gaither confession was voluntary, the Sage confession was voluntary, and when you construe this record as favorably as you [4] desire in favor of the Government the only inference to be drawn is that even if these men were beaten the beating did not bring about the giving of a confession. The confessions were voluntary. Now, we submit there is a variance between the proof and between the allegations in the indictment as to what act constituted the deprivation of the federal right under the Civil Rights law. This is a statute which requires two things. It requires an act and it requires that that act be performed with a specific intent to violate that federal statute. I will not say here today that the Government could not prosecute under the Civil Rights Act simply by

proving a beating. There can be circumstances where a beating would violate the Civil Rights Act and there can be circumstances where a beating can be executed as a disciplinary measure and would be strictly a matter within the jurisdiction of the states and not the federal government. However, this indictment charges the defendants who are being tried with obtaining a confession by force and violence. "We charge you with an act. That is, obtaining a confession by force and violence, and that you performed that act with a specific intent in mind, namely, to deprive the prisoner of his immunity not to have a confession beaten from him by force and violence." Now, if your Honor please, not every variance—not every variance is grounds for a new trial or acquittal. The Federal Rules of Criminal Procedure, in fact, state that a variance shall not be grounds for [5] reversal unless, as our United States Supreme Court has said, a defendant has been misled and prejudiced in the presentation of his defense. Therefore, we undertake the burden to demonstrate to this Court how the variance between the manner in which the confession was obtained and the manner described in the indictment prejudiced this defendant. We all agree that the Government must prove beyond a reasonable doubt the specific intent to deprive the prisoner of that constitutional right specified in the indictment. When the Government finished its case and merely proved a beating and didn't prove that the confession was obtained that way the defendant could have sat back and decided not to testify as to his

state of mind, and as to the commission of the act. The defendant, relying on the indictment that the specific intent they were going to prove was the intent to obtain a confession by force and violence accompanied by the act of obtaining that confession by force and violence, felt therefore there was no need to testify. If the defendant had been informed by an indictment that—if the defendant had been informed by an indictment, your Honor, that what he was being charged with was particularly with the act of summarily punishing a prisoner without a trial by jury that would have put the issue of specific intent in a different light. As I stated to the Court, it is one thing to say to a defendant the act you have performed is that you have beaten a prisoner with the intention of punishing him without a jury [6] trial, and stating you have obtained a confession by force and violence with the intention of obtaining that confession by force and violence. If this defendant had known from the indictment that what he was charged with was a beating, unrelated to obtaining a confession his decision as to testifying or the decision of his counsel might have been different. As the evidence stood the jury could have inferred that the beating was a disciplinary measure. Even if the jury believed that there was a beating by the defendant they would certainly consider a verdict of not guilty. The jury could have inferred that the beating was done maliciously. But the jury could never infer that the beating was the means by which the defendant obtained the con-

fession because Sage and Gaither said, "We would admit to nothing," and they would not give the confession until incriminating evidence was presented to them. Let me read to the Court, if I may, from 341 U. S. 97, *Williams vs. United States*:

"The indictment charged that petitioner deprived designated persons of rights and privileges secured to them by the Fourteenth Amendment. These deprivations were defined in the indictment to include illegal assault and battery. But the meaning of these rights in the context of the indictment was plain, namely, immunity from the use of force and violence to obtain a confession. Thus Count II of the indictment charges that the Fourteenth Amendment rights of one Purnell were violated in the following respects: The [7] right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune while in the custody of persons acting under the color of the laws of the State of Florida from illegal assault and battery by any person exercising the authority of said state, and the right and privilege to be tried by due process of law * * *"

and the Court goes on and concludes that the crux of this indictment was the charge that the act committed was obtaining the confession by force and violence. The Supreme Court even italicized the

words "immunity from the use of force and violence to obtain a confession." In the decision of *Jones v. United States*, Fifth Circuit, an indictment was dismissed because a District Court construed it as charging the prison official with a beating, and the District Court said if it was only a beating that he had it is a matter for state jurisdiction. We do not find an area in which the Federal Government can operate in this field. The case was appealed to the United States Court by the Government and the Supreme Court remanded to the Circuit Court of Appeals of the Fifth Circuit in order to interpret the indictment. The Fifth Circuit Court of Appeals said this, your Honor. "We don't interpret that indictment [8] like the District Court did. We say it means that the prison official obtained statements and confessions by force and violence, and when we construe it in that narrow manner we find that the government states a prima facie offense under the Civil Rights law." In short, the United States Supreme Court and the Fifth Circuit Court of Appeals have taken the identical language that the Grand Jury selected and given it legal meaning, and the meaning is that the act which deprives the person of his federal rights under the Civil Rights law is obtaining the confession by force and violence and the specific intent to obtain a confession by force and violence. We further submit to the Court that if we construe the Government's evidence as favorably as we can to support the conviction, they can show a beating, they can show that the beating may have stemmed from a desire to get a statement or a

confession, but they can not prove that the statement or confession was obtained by force and violence and that is the act which they charge in the indictment. We further submit to your Honor that there is prejudice to this defendant. There is prejudice to this defendant. If this indictment had merely said that this defendant had beaten the prisoner with the intent of trying him by ordeal, which is what the U. S. Attorney in summation and the Court in its instructions refer to, the decision of his counsel as to his testifying on his state of mind and as to whether or not he committed the act might have been different, because [9] the Government would not have to make as strong a burden of proof. But when this defendant read the indictment which charged him with the act of obtaining a confession by force and violence and he heard the evidence of Sage and Gaither that the confessions were voluntary without a beating he could only be called upon to meet the standard of proof set forth in that indictment, and that standard was so severe, because the Grand Jury had charged him with getting the confession by violence that his counsel may have made the decision that there was no need for him to testify. We have shown a prejudicial variance between the record construed favorably by the Government to support a conviction and the indictment construed by the Supreme Court of the United States. It was settled.

Now, let us turn, if your Honor please, to the trial itself. Toward the end of the trial the District Attorney of Clark County, George Dickerson, testi-

fied. Mr. Babcock asked him this question, he said "Mr. Dickerson, when you said on direct testimony that you participated in the Grand Jury investigation of Pool what did you mean?" We submit there was nothing wrong with that question, asking him on cross-examination, "what did you mean by participating?" is not objectionable. It is not an objectionable question, and Mr. Dickerson answered, he said, "I was not in the Grand Jury room." He said, "I gave advice to the Grand Jury and when the Grand Jury finished I talked to them," and then the record shows that on his own [10] volition the Clark County District Attorney said, "I advised the Grand Jury that at the most Pool had committed a misdemeanor offense and that since the Grand Jury is an arm of the District Court and the District Court does not try misdemeanor offenses the Grand Jury should not indict." Mr. Watson moved to strike the legal opinion of Mr. Dickerson and his motion was denied, the ground given was that he could have anticipated the admissible nature of Mr. Dickerson's answer. We state, your Honor, that no one could have anticipated that when Mr. Dickerson was asked "what did you mean by participating" he would express to this jury an opinion that Chief Pool committed an offense under the laws of the State of Nevada. Can this Court imagine anything so prejudicial as to permit a man having the prestige of the Clark County District Attorney to state to the jury that he had advised his Clark County Grand Jury not to indict because at most he had committed a misdemeanor offense. I

have a transcript of the record. That was the question and that was the answer, and it was severely prejudicial in a case where all the Government could offer were two convicted felons whose testimony the jury could have discarded under the law, and one person who admitted signing an inconsistent statement and whose testimony the jury could have discarded. Not one witness in this case appeared whose testimony could not have been ignored by that jury for sound legal reasons. All three were impeached. Two were impeached by felony convictions [11] and one was impeached by an inconsistent statement which he tried to explain away. Therefore, imagine the tremendous power of the Clark County District Attorney stating in front of this federal jury, "I advised my Grand Jury that at most he had committed a misdemeanor offense and that therefore there should be no indictment." Now, if your Honor please, I would like to point the Court's attention, if the Court will indulge me another minute, to this. The defendant offered Exhibit C which was a statement signed by the Witness Carlson, which on its face impeached the testimony of that witness. The Court at that time accepted the objection of the U. S. Attorney that since the statement bore the heading "North Las Vegas Police" it was some official document which could not be admitted at that time. We submit that since Witness Carlson stated that was the original instrument which he signed it is immaterial what notation it bore at its head, and the Court must

have reached a similar conclusion because at the close of the trial the Court admitted the document. Now, this was a critical document. Sage and Gaither were convicted felons. Carlson was the only one testifying having weight and Carlson tried to explain he signed an inconsistent statement because Chief Pool told him the Grand Jury of Clark County was investigating the matter. This document, Exhibit C, was signed by Carlson, he later admitted, five days before the Clark County Grand Jury investigated the matter. Carlson signed this [12] statement before the Clark County Grand Jury investigated the matter. If the Court had admitted the statement and Chief Pool's counsel had been able to read that statement to the jury while Carlson was on the witness stand being cross-examined and while his demeanor was under observation of the jury imagine the difference between the introduction of the document at that time and the introduction of the document at the last account of the trial. The jury must have made its mind up long before that document was admitted. Carlson in his testimony attempted to throw a smoke screen about these documents by saying that Chief Pool pressured him in the light of the Grand Jury investigation. This document he signed before the Grand Jury of Clark County heard of the matter and investigation was deferred until the end of the case. I believe that the defense of Chief Pool was seriously impaired by being deprived of the opportunity to read to that jury

the inconsistent statement when Carlson was on that witness stand, and that the prejudice resulting to the defendant was not overcome by a ruling admitting that same document at the close of the case. There was no reason to keep that document out and it was critical because as I stated, Sage and Gaither were convicted felons, were sent to prison by Chief Pool and this jury could certainly have taken that into account when they considered that testimony, but Carlson was a police officer and any discretion which the Court could have exercised to enable an attorney for Chief Pool to [13] discredit Carlson with the proper document should have been exercised in favor of the defendant at that time. Now, I would like to take up with the Court, and I appreciate the Court giving me this opportunity to present these arguments, the jury instructions. At the outset counsel for the defendant did not object to the jury instructions. The general rule is that a failure to object deprives the defendant of the right later to challenge the instructions. However, in *Screws vs. the United States*, the decision which interpreted the Civil Rights Act, in that case the defendant did not object to the jury instructions and the Supreme Court said that where an omission goes to the essential ingredients, these are the words of the Supreme Court, "where the omission goes to the essential ingredients of the offense alleged in the indictment the instructions are open to challenge despite a failure of defense counsel to object." On page 4 of

the instructions to the jury, your Honor, the Court stated this: "Defendant Pool is on trial for depriving Sage and Gaither of certain rights, privileges and immunities secured and protected to them by the Constitution of the United States, and Defendant Clifton is on trial for depriving Sage of certain rights, privileges and immunities secured and protected to him by the Constitution of the United States. The Fourteenth Amendment to the Constitution provides that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person [14] "within its jurisdiction the equal protection of the law." At the outset of the instructions the Court did not inject the idea that the Government must prove specific intent. The Court said that Defendant Pool is on trial for depriving * * * and that is all. Next, and I will admit that later in the instructions the Court did instruct on specific intent, but I will come to that in a moment. Later in these instructions, your Honor, the Court said, "The Court charges you that Sage and Gaither had the right to be tried upon any charge for which they had been arrested, in a regularly constituted court of justice having jurisdiction and if found guilty subjected to the usual pain and penalties applicable to all persons alike for the offense charged, but not to be subjected to unusual punishment or to be tried by ordeal. These were constitutional rights. We submit that that instruction amends the indictment. The instruction did not say to the jury, "you are

charged that if you found Defendant Pool obtained a confession by force and violence you would find him guilty." The instruction took, if your Honor please, the Civil Rights Act, in which half of the statute talks about discriminating against a person on grounds of being an alien or on grounds of his race and color, and says it is a crime to subject a person to unusual pains or penalties on account of race, color or on account of being an alien.

That was injected into the instruction and the instruction did not charge the jury with the critical element, [15] and that is, obtaining a confession by force and violence. On the next instruction the Court was careful. However, the Court did not relate the specific intent to the obtaining of the confession by force and violence. The Court said this, "It is necessary for the jury to find that the defendants had in mind the specific purpose of depriving Sage of a constitutional right, that is to deprive him of the right to be tried by a court, to be tried in an orderly way, and to receive, if found guilty, the usual pains and punishment for any offense whenever committed." And to convict Pool, under Count II, "it is necessary for the jury to find that the defendant had in mind the specific purpose of depriving Gaither of a constitutional right, that is, to deprive him of a right to be tried by a court, to be tried in an orderly way, and to receive, if found guilty, the usual pains and punishment for any offense whenever committed." And then the Court went on to add, "when they so act, they at least act in

reckless disregard of constitutional prohibitions or guarantees.” Now, firstly, the instruction nowhere talks about obtaining a confession by force and violence. Nowhere in these instructions is there conformity to the crux of the indictment; and, secondly, a recent ruling of this Circuit in *Forster v. United States*, a tax fraud case, held that it is reversible error if in the instructions on wilfully the Court injects the idea that a reckless disregard of the law compels a finding of guilty. In *Forster v. United States* [16] this Circuit unanimously held that when a jury is instructed as to the meaning of the word “wilful intent” under the tax fraud statutes, and by analogy under this statute, then that instruction can not be diluted by an implication that a reckless disregard of the law permits a finding of specific intent. That is not the law in other circuits. It is, however, the law in the Ninth Circuit. We submit that the jury did not get a clear picture of two things, first, that the act for which the Defendant Pool was charged was obtaining a confession by violence, and two, that the specific intent must be to obtain the confession by violence, and finally that that must be wilful intent, conduct with an evil purpose, and the jury should not be permitted to infer that reckless conduct is wilful conduct. Our Court of Appeals said that even a reckless disregard of the Internal Revenue regulations is not enough as long as a man makes out a defense that he relied on his accountants, and that his action was not wilful. The instruction was diluted. Now, even in the

close of the instructions, if your Honor please, the Court said this. "As to Count I, let me summarize the questions you have to determine. 1. Did Defendants Pool and Clifton take Sage into custody under color of law? 2. Did the Defendants Pool and Clifton specifically intend to deprive Sage of a constitutional right guaranteed to him by the United States Constitution? 3. Has the Government established these two foregoing essentials to your satisfaction [17] beyond a reasonable doubt?" Where is the jury informed that they must determine that the Defendant Pool committed an act depriving the prisoners of the constitutional rights specified in the indictment? It is not in there. The final summary instruction is proper as to the question of acting under color of law, is proper as to asking the jury to rule on the question of intent, is proper on compelling the jury to find to its satisfaction beyond a reasonable doubt, and omits any reference to obtaining a confession by violence, and to omit it is a critical point. To say that the jury is not bound by the Government's obligation to prove beyond a reasonable doubt that the act charged in the indictment, namely, obtaining a confession by force and violence, was the act committed by the defendant. It was not in the Government's proof and it was not contained in any of the instructions, and particularly misleading was its absence from the final summary instruction.

There is one other matter, before I close, which I would like to draw to your Honor's attention without taking too much time. It is simply this. That

the thought seriously exists in my mind whether the testimony of Mr. Pool's former wife, Ramona Wolf, whether his statements to her was not a confidential communication. In *Blau v. United States*, the Supreme Court said that there is a presumption that a communication to a wife is confidential. Now, generally that presumption is overcome by the presence of a third person. We make [18] this interesting observation in this case for the Court. Since the Government charged Pool with a specific intent to violate the law, the inference to be drawn is that Chief Pool, knowing he was violating the law, would not have permitted her to overhear that unless she was his wife. The Government, assuming that since she worked for the City of North Las Vegas it was not a confidential communication makes an unreasonable inference. They are charging him with a violation of law and in Court they are saying he is doing things in front of a woman not because she is his wife but because she is secretary of a Police Department. It is inconsistent. In this motion for a new trial affidavits have been filed related to the question of bias and prejudice. Your Honor has had an opportunity to examine those affidavits and I will not take the time of the Court to argue the effect of those affidavits because the record speaks for itself. I urge upon the Court, however, that this initial argument, that this indictment has been construed by our Courts that Chief Pool was charged with extorting a confes-

sion by force and violence, with specific intent to do so; that the Government has specified too much in the indictment, and I am not saying that language might not have been sufficient—I am saying they have specified more than they could prove because the proof shows that the statements were given voluntarily and that because of the nature of the issue of specific intent, the failure of this defendant to take the witness [19] stand to testify as to the act committed and as to his state of mind reveals the prejudice to this defendant stemming from the variance between the indictment and the proof. That is a serious error. It would mislead any defendant who had to weight whether to testify as to his state of mind. To say you committed one act in an indictment and to prove another act or a lesser act, namely, just a beating without getting a confession as a result of that beating is to put a different burden of proof on the issue of specific intent, and I believe that it is obvious that it was misleading to the defendant, and in this case it is vital to sustain the conviction. Thank you.

The Court: Are there any remarks or argument by the Government in connection with this Motion?

Mr. Babcock: We would submit without argument, if the Court please.

The Court: In this matter on the motion of the Defendant William Cecil Pool for a New Trial it is ordered that the Motion be and the same is hereby denied.

Mr. Galane: If your Honor Please, if I may

have the attention of the Court for a moment, we have prepared a Notice of Appeal together with a Petition for Bail pending Appeal with affidavits attached to that Petition relating to the issue of bail, and Points and Authorities in support of bail pending appeal. If the Court would permit me I would like to submit these documents to the attention of the Court for consideration [20] of the Court at this time.

The Court: You may.

Mr. Galane: And I have a copy for the U. S. Attorney.

The Court: Do you wish to be heard on the Petition on the part of the Government?

Mr. Rittenhouse: Your Honor, insofar as the defendant's entitlement to bail pending appeal I don't think there is any serious question but that the Court does have discretion to fix bail. I should like to inquire as to what the present bail is.

The U. S. Marshal: I think it is Twenty-Five Hundred Dollars.

Mr. Rittenhouse: In the event it is Twenty-Five Hundred Dollars, your Honor, we would move that bail be fixed in the sum of Five Thousand Dollars.

The Court: In connection with the defendant's Petition for Bail pending Appeal it is the Order of the Court that the defendant be and he is hereby committed to the custody of the Marshal, subject, however, to being admitted to bail on the filing of a proper bond in the amount of Five Thousand Dollars.

Mr. Rittenhouse: Is defendant ordered remanded?

The Court: Until such time as the bail is deposited. Gentlemen, we have disposed of the immediate matters before the Court, the Motion for a New Trial on the part of the Defendant Pool and the matter of his bail. Once before in this [21] case the Court had occasion to refer to the integrity of the Court. There are two unusual sets of affidavits filed in this matter, one on behalf of the defendant, the other set on behalf of the Government. The statements made in each of the opposing sets of affidavits can not be true. If the statements in one set of the sworn affidavits are true the statements to the contrary in the opposing set of affidavits must be false. The Court recommends to the proper government officials that there be pursuant to statute and law applicable to such situations, a full and complete investigation to the end that if there be perjury or false swearing on the part of any of these affidavits that the matters be referred to the Grand Jury and thereafter the Court and the U. S. Attorney's office follow any recommendations that may be made by the Grand Jury. Now this Court is having its first experience, when I say "first experience" I mean during the last several months, as a Judge of this Court in Clark County. It may be that the Court's mistaken, but the Court has the feeling that there are some things that may be characterized as rather out of the ordinary occurring under this southern sun insofar as Court matters are con-

cerned. As an individual I am fully apprised and aware of the local situation insofar as, shall I say, rivalry between the newspapers. Whatever the situation may be, having in mind the freedom of the press on the one hand and the integrity of the Court on the other, there should not be conduct [22] on the part of newspapers or individuals which can ultimately tend to the obstruction of the course of justice. I propose on every occasion that it comes to my attention to direct that full and proper action be taken against every man and woman within my district who has sworn falsely or who has committed perjury. I propose that the Court, on every newspaper, whether it be in the north or the south of this district that, by its acts and publications tends to obstruct justice as the law of this land says it shall be meted out, shall take action. We are all intelligent people. We know the bounds and the limits to which we may go. We know when we are beyond those bounds. As was said by a rather famous speaker before the State Bar only two days ago, "a judge cannot protect himself." The Court must read and hear whatever criticism is made. The only way that the processes of the law can be preserved is to take proper legal action against all persons who have exceeded the bounds of propriety. This is the first time I have had occasion to make such a statement. I hope I never have to make it again. We will be in recess.

(Whereupon Court recessed at the hour of 4:30 o'clock, p.m., Monday, November 18th, 1957.)

I Hereby Certify That the foregoing pages, numbered 1 to 23, inclusive, comprise a true and accurate transcript of my shorthand notes taken at the proceedings in the foregoing matter. Dated at Las Vegas, Nevada, this 3rd day of December, 1957.

/s/ STELLA BUTTERFIELD,
Official Court Reporter.

[Endorsed]: Filed December 5, 1957. [23]

[Title of District Court and Cause.]

DOCKET ENTRIES OF THE PROCEEDINGS
IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NE-
VADA

1956

- Oct. 5—Filing Indictment.
- Oct. 5—Filing Sealed Record of Concurring Grand Jurors.
- Oct. 5—Entg. Order Warrants Issue Bond: \$2,500 each.
- Oct. 5—Issuing Warrants for Arrest of Deft's (Orig. & one copy each handed Marshal).
- Oct. 9—Filing Appearance Bond for Deft. Wm. C. Pool, in the sum of \$2,500.00, with Mrs. Kenneth Huff and Dorothy Porter Pool as sureties thereon.

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- Oct. 12—Filing Warrant for Arrest. Entg. Return. Arrested Deft. at 2414 North Main St., No. Las Vegas, Nev., on 10/8/56.
- Oct. 19—Filing Commissioner's Waiver of Removal Hearing.
- Oct. 19—Filing Warrant of Arrest. Entg. Return. Received the within Warrant the 10th day of Oct., 1956, and executed same.
- Nov. 1—Filing Court Appearance Bond for Deft. Edward E. Clifton in sum of \$2,500 with Carolina Casualty Ins. Co., as sureties thereon with Commissioner's Final Commitment and Record of Proceedings attached.
- Nov. 19—Entg. Order that Carlos G. Watson is associated with Zenoff, Magleby and Manzonie for the purpose of this case to represent Deft. Wm. C. Pool.
- Nov. 19—Defendants present on bond. Carlos G. Watson representing Wm. C. Pool. No atty. for Deft. Edward E. Clifton. Copy of Indictment handed Deft. Wm. C. Pool. Arraigned. Plea: Count I: Not Guilty. Count II: Not Guilty. Entg. Order that time for arraignment of the Deft. Edward E. Clifton is continued to Wednesday, November 21, 1956, at 10:00 a.m. at which time a trial date for Deft. Wm. C. Pool will be set. Defendants released on present bond.

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Nov. 21—Defts. present on Bond. Deft. Wm. C. Pool with Atty. Carlos G. Watson. Deft. Edward Ellis Clifton with Atty. Gene Matteucci. Copy of Indictment handed Deft. Clifton. Arraignment Plea as to Deft. Clifton: Count I: Not Guilty. Ordered that this case be set for Jury Trial on March 27, 1957, at 10:00 a.m. Defts. released on present Bond.

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- Jan. 15—Filing Subpoena. Entg. Return. Served Coite M. Gaither at Nevada State Prison, Carson City, Nev., on Jan. 14, 1957.
- Jan. 15—Filing Subpoena. Entg. Return. Served Ray L. Sage, Jr., at Nevada State Prison, Carson City, Nev., on Jan. 14, 1957.
- Jan. 16—Filing Reporter's Transcript of Proceedings of Nov. 21, 1956, as to Deft. Clifton. Arraignment.
- Jan. 16—Filing Reporter's Transcript of Proceedings of Nov. 19, 1956, as to Deft. Pool. Arraignment.
- Feb. 28—Entg. Order vacating the setting of March 27, 1957, for trial and placing same on Judge Ross' Criminal Trial Calendar for setting. (Counsel notified.)
- Apr. 18—Entg. Order setting this case for Trial with a Jury on Oct. 14, 15, 16, 17 and 18, 1957, at 10:00 a.m.
- Apr. 19—Counsel notified.

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Sept.17—Filing Subpoena to Testify. Entg. Return. Served W. D. Richard at Fire Station, Henderson, Nevada, on September 13, 1957.

Sept.17—Filing Subpoena to Produce Document or Object. Entg. Return. Served Viola Trick at Rose De Lima Hospital, Henderson, Nevada, on September 13, 1957.

Sept.17—Filing Subpoena to Produce Document or Object. Entg. Return. Served William Witte at Clark County Sheriff's Office, Las Vegas, Nevada, on September 13, 1957.

Sept.17—Filing Subpoena to Produce Document or Object. Entg. Return. Served George Crisler at Henderson Police Dept., Henderson, Nevada, on September 13, 1957.

Sept.17—Filing Subpoena to Produce Document or Object. Entg. Return. Served Dr. J. H. Coogan at Rose De Lima Hospital, Henderson, Nevada, on September 13, 1957.

Sept.17—Filing Subpoena to Produce Document or Object. Entg. Return. Served Dr. James B. French at 1100 Arizona St., Boulder City, Nevada, on September 13, 1957.

Sept.24—Filing Subpoena to Testify. Entg. Return. Served Coite Martin Gaither, Jr., at U. S. Marshal's Office, Las Vegas, on September 17, 1957.

Sept.24—Filing Subpoena to Testify. Entg. Return. Served Vic Carlson at 10th and Fremont

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- Streets, Las Vegas, Nev., on Sept. 17, 1957.
- Sept. 27—Filing Subpoena to Testify. Entg. Non-est. Return. Unable to locate Ray Lewis Sage, Jr., at Dundalk, Md.
- Oct. 4—Filing Subpoena. Entg. Return. Served Ramona M. Wolf at Detroit Lakes, Minnesota on September 25, 1957.
- Oct. 5—Filing Subpoena to Testify. Entg. Return. Served Ray Lewis Sage, Jr., near Slaty Fork, W. Va., on September 21, 1957.
- Oct. 8—Filing Trial Memorandum on behalf of Deft. Wm. C. Pool. (Watson.)
- Oct. 8—Filing Trial Memorandum on behalf of Deft. Edward E. Clifton. (Matteucci.)
- Oct. 10—Filing Trial Memorandum on behalf of Plaintiff. (Babcock.)
- Oct. 10—Filing Subpoena to Testify. Entg. Return. Served Al Ferguson at 2000 S. Fifth Street, Las Vegas, Nevada, on Oct. 7, 1957.
- Oct. 14—Filing Subpoena to Testify. Entg. Return. Served George Dickerson at Clark Co. Courthouse, Las Vegas, Nevada, on Oct. 7, 1957.
- Oct. 14—Trial with a jury. Ordered that Pltf's Exhibits Nos. 1 through 4 be replaced with photostatic copies in lieu of the original exhibits now on file.
- Oct. 15—Filing Subpoena to Produce. Entg. Return. Served Robert M. Nelson at 2101

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- Cartiar St., No. Las Vegas, Nev., on Oct. 12, 1957.
- Oct. 15—Filing Subpoena to Produce. Entg. Return. Served Clarke Davison at E & T Drug Store, No. Las Vegas, Nev., on Oct. 12, 1957.
- Oct. 15—Further trial.
- Oct. 16—Further trial. Plaintiff Rests. Ordered Deft's Motion of Acquittal of Count I of the Indictment as to Deft. Edward E. Clifton is denied. Ordered Deft's Motion of Acquittal of Counts I and II of the Indictment as to Deft. William Cecil Pool is denied. Defendant Rests as to Deft. William C. Pool. Defendant Rests as to Deft. Edward E. Clifton.
- Oct. 17—Further trial.
- Oct. 17—Filing Verdict of the Jury as to Deft. William Cecil Pool. Verdict: We, the Jury in the above-entitled case, find the Deft. William Cecil Pool guilty as charged in the first count of the Indictment; and guilty as charged in the second count of the Indictment.
- Oct. 17—Filing Verdict of the Jury as to Deft. Edward Ellis Clifton. Verdict: We, the Jury in the above-entitled case, find the defendant, Edward Ellis Clifton, guilty as charged in Count I of the Indictment.
- Oct. 17—Entg. Order that time for imposition of sentence is continued to Friday, Novem-

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ber 1, 1957, at 10:00 a.m. Further Ordered that bail heretofore fixed in the sum of \$2,500.00 for each of the defendants is approved and continued.

- Oct. 17—Filing Instructions given by the Court.
- Oct. 18—Filing Comments made Outside the Presence of the Jury—October 17, 1957.
- Oct. 22—Filing Order Extending Time. Ordered, that the defendants above named, and each of them, are hereby granted to and including the 29th day of October, 1957, in which to make their motions for a new trial, and the five-day period specified in the last sentence of said Rule 33 is extended to said 29th day of October, 1957.
- Oct. 23—Filing Withdrawal of Attorney M. Gene Matteucci as Attorney for Deft. Edward Ellis Clifton.
- Oct. 23—Filing Subpoena Duces Tecum. Entg. Return. Served George Dickerson at U. S. Marshal's Office, Las Vegas, Nevada, on October 16, 1957.
- Oct. 23—Filing Subpoena Duces Tecum. Entg. Return. Served Clarke Davison at U. S. Marshal Office, Las Vegas, Nevada, on October 16, 1957.
- Oct. 24—Counsel notified and copies of Order Extending Time mailed.
- Oct. 29—Filing Motion for New Trial on behalf of Deft. William Cecil Pool with Affidavit of Herman M. Greenspun, Donald I. Mil-

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ler and Margaret Simpson attached thereto.

Oct. 30—Entg. Order setting hearing on Motion for New Trial on November 18, 1957, at 3:30 p.m.

Oct. 31—Counsel notified and Notice to Counsel mailed.

Nov. 1—Deft's are present on Bond. Samuel S. Lionel associated with Jerome Weber appearing for Deft. Clifton. Upon Motion of Mr. Lionel, It Is Ordered that Jerome Weber is admitted to practice in this Court for the purpose of this case. It Is Further Ordered that Gene Matteucci at this time is permitted to withdraw as Attorney on behalf of Deft. Clifton. Time for sentence. Mr. Magleby moves the Court to continue the time for imposition of sentence pending the hearing on Motion for a new trial to be heard on November 18, 1957. It Is Ordered that Motion for Continuance be, and the same hereby is, Denied. Sentence as to Deft. Pool: Judgment: Ordered Deft. is hereby committed to the custody of the Attorney General for a period of **One (1) Year on Count I and One (1) Year on Count II**. Ordered that the sentence imposed on Count II is to run concurrently with the sentence imposed on Count I. Further Ordered that Bond heretofore fixed in the sum of

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\$2,500.00, be, and the same is hereby, approved and continued. Sentence as to Deft. Clifton. Judgment: Ordered Deft. is hereby committed to the custody of the Attorney General for a period of Six (6) Months. Mr. Weber moves the Court for additional time in which to file a Motion for a new trial. It Is Ordered that Motion for additional time, be, and the same hereby is, denied. Further Ordered that Bond of Deft. Clifton is exonerated. Deft. Remanded.

Nov. 1—Issuing Judgment and Commitment as to Deft. Pool. (Original and one handed Marshal.)

Nov. 1—Issuing Judgment and Commitment as to Deft. Clifton. (Original and one handed Marshal.)

Nov. 14—Filing Points and Authorities in support of Deft's Pool Motion for New Trial. (Z. & M.)

Nov. 18—Filing Affidavits of Charles L. Martin, William R. Henderson, Ramona Wolf and Victor L. Carlson in Opposition to Defendant William Cecil Pool's Motion for New Trial. (Rittenhouse.)

Nov. 18—Hearing on Motion for New Trial on behalf of Deft. Wm. C. Pool. The Court ruled that the motion is denied. Ordered that Bail Pending Appeal be fixed in the sum of \$5,000.00. Deft. remanded subject

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to the filing of a proper bond in the sum of \$5,000. Further Ordered that the original bond filed October 9, 1956, in the sum of \$2,500.00, is exonerated.

Nov. 18—Filing Notice of Appeal. (Galane.)

Nov. 18—Filing Petition for Bail Pending Appeal, with Affidavit of Paul Mathis and Dorothy Pool attached thereto. (Galane.)

Nov. 18—Filing Points and Authorities in Support of Petition for Bail Pending Appeal. (Galane.)

Nov. 18—Filing Notice of Appearance of Morton Galane.

Nov. 18—Filing Bail Bond Pending Appeal, in the sum of \$5,000.00, with Dorothy Greco Porter Pool and Roxie Huff as sureties thereon.

Nov. 18—Filing Reporter's Transcript. (Jury Trial, Oct. 14, 15, 16, 1957.)

Nov. 18—Filing Reporter's Transcript Re: Remarks of Court.

Nov. 26—Filing Reporter's Transcript Re: Sentence.

Dec. 2—Filing Judgment and Commitment as to Deft. Clifton. Entg. Return. Delivered Deft. to Federal Correctional Institution at Terminal Island, California, on November 21, 1957.

Dec. 3—Filing Ruling on Motion of William Cecil Pool for a New Trial. Entered Order that

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the Motion of the Deft. William Cecil Pool for a New Trial is denied.

Dec. 3—Counsel notified.

Dec. 5—Filing Reporter's Transcript of Deft's Pool Motion for New Trial.

Dec. 12—Filing the Appellant William Cecil Pool's Designation of Record on Appeal.

Dec. 13—Copy of Notice of Appeal mailed to U. S. Attorney.

Dec. 13—Copy of Notice of Appeal and Statement of Docket Entries mailed this day to Clerk, U. S. Court of Appeals.

Dec. 18—Filing Counter Designation of Record. (Rittenhouse.)

Dec. 20—Filing Order Extending Time to File and Docket Record on Appeal. Order: Time to file and docket record on appeal is extended to and including Jan. 20, 1958.

Dec. 23—Counsel Notified. (Copies Mailed.)

Dec. 23—Copy mailed to Paul P. O'Brien.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents, listed in the attached index, are true and correct copies of the originals on file in this office, or true and cor-

rect copies of orders entered in the minutes or dockets of this court, in the above-entitled case, and that they constitute the record on appeal as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of January, A.D. 1958.

[Seal] OLIVER F. PRATT,
Clerk;

By /s/ KAY MONA SMITH,
Deputy Clerk.

[Endorsed]: No. 15865. United States Court of Appeals for the Ninth Circuit. William Cecil Pool, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed January 14, 1958.

Docketed January 24, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15865

WILLIAM CECIL POOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS
ON APPEAL

Pursuant to Rule 17(6) of this Court, appellant submits the following statement on the points on which he intends to rely:

1. The Court erred in refusing to grant the defendant Pool's motion for a new trial which motion was based upon the failure of the evidence to support the verdict, in that, arguendo, assuming the evidence is construed favorably to the plaintiff it shows that (a) in the case of prisoner Gaither after his alleged beating he denied any knowledge of a crime, thereafter for about five and one-half hours he admitted nothing while in jail, thereafter he was shown a sack full of change and pieces of paper which he read, then he offered to confess to certain burglaries and not to any other burglaries, and (b) in the case of prisoner Sage after his alleged beating he admitted nothing, thereafter he was in jail

overnight and admitted nothing, and on the next day after he was shown the confession of prisoner Gaither he offered to confess to the same burglaries as Gaither did, and the indictment required the plaintiff to prove beyond a reasonable doubt that the deprivation of a Federal constitutional right which defendant Pool committed was obtaining from each prisoner a confession, statement or information by force and violence with the specific intent to deprive each of the said prisoners of the specified Federal constitutional right.

2. The Court erred in refusing to grant the defendant Pool's motion for a new trial which motion was based upon a material variance between the evidence and the indictment, in that, assuming *arguendo* the evidence is construed favorably to the plaintiff it shows that (a) in the case of prisoner Gaither after his alleged beating he denied any knowledge of a crime, thereafter for about five and one-half hours he admitted nothing while in jail, thereafter he was shown a sack full of change and pieces of paper which he read, then he offered to confess to certain burglaries and not to any other burglaries, and (b) in the case of prisoner Sage after his alleged beating he admitted nothing, thereafter he was in jail overnight and admitted nothing, and on the next day after he was shown the confession of prisoner Gaither he offered to confess to the same burglaries as Gaither did, and the indictment included as one of the elements of the offense that defendant Pool had deprived each of the prisoners

of a Federal constitutional right by obtaining a confession, statement or information by force and violence with the specific intent to deprive each of the said prisoners of the specified constitutional right, and that the said variance was prejudicial to defendant Pool in that it caused him not to testify in his own behalf either as to the alleged act or his state of mind.

3. The Court erred in refusing to grant the motion of defendant Pool to strike certain evidence and in refusing to instruct the jury to ignore such evidence, which motion was timely during the testimony of witness George Dickerson, District Attorney of Clark County, Nevada, who testified as follows:

“Q. Mr. Dickerson, I believe you testified this morning that you had participated in part in the matter of presentation of this matter to the Clark County grand jury. What did you mean when you said in part?

“A. I was not present during any time when the evidence was submitted. I was present outside after the conclusion of the matter. Questions as to the legal problems involved, as to what crimes, if any, could be determined by the grand jury were asked of me, at which time I informed the grand jury that it was without jurisdiction to entertain any action in this regard, in that the evidence adduced constituted at the most a misdemeanor offense; that the grand jury is an arm of the district court and can

return an indictment only on matters tried with the district court.

“Mr. Watson: I think Mr. Dickerson’s legal opinion in the matter of the State law of Nevada in the matter of the grand jury is not proper at all, as being prejudicial and should be stricken.

“The Court: Let me make this very obvious observation. Counsel are not permitted to sit idly by and allow inadmissible matter to go into the record and thereafter gamble on the chance of it being favorable or unfavorable and moving to strike. They are required to make objections to questions asked. Now this Court was aware of it as soon as that question was asked, but you didn’t see fit to make the objection.

“Objection overruled.”

4. The Court erred in refusing to grant defendant Pool’s motion for a new trial, which was based in part on the Court’s refusal to strike the evidence set forth hereinabove in paragraph 3.

5. The Court erred in excluding from evidence during the cross-examination of witness Victor L. Carlson defendant Pool’s Exhibit C, which was offered by defendant Pool during the cross-examination of witness Victor L. Carlson for the purpose of impeachment, said Exhibit C comprising an inconsistent statement identified as having been signed by witness Victor L. Carlson.

6. The Court erred in refusing to grant defendant Pool’s motion for a new trial, which based in

part on the Court excluding the evidence set forth hereinabove in paragraph 5.

7. The Court erred in admitting into evidence over the objection of defendant Pool to testimony of witness Ramona Wolf and in overruling said objection, since the testimony related to the interrogation of prisoner Gaither by defendant Pool in front of witness Ramona Wolf, and the objection made was that witness Ramona Wolf was the wife of defendant Pool at the time of the said occurrence, that the communications were made to her in confidence as the wife of defendant Pool, and that such confidential communications could not be disclosed over the objection of defendant Pool.

8. The Court erred in refusing to grant defendant Pool's motion for a new trial, which was based in part on the Court admitting into evidence the testimony of witness Ramona Wolf set forth hereinabove in paragraph 7.

9. The Court erred in instructing the jury in that the instructions as a whole failed to state that the charges against defendant Pool was the obtaining from a prisoner a confession, statement or information by force and violence with the specific intent to deprive the prisoner of that specified Federal constitutional right and therefore the Court omitted an essential ingredient of the offense charged.

10. The Court erred in refusing to grant defendant Pool's motion for a new trial, which was based

in part upon the omission from the instructions referred to hereinabove in paragraph 9.

11. The Court erred in instructing the jury in the following manner:

If you find from the evidence in this case that the defendants took Sage and Gaither into custody under color of law by reason of the positions they held, then the court charges you that Sage and Gaither had the right to be tried upon any charge for which they have been arrested, in a regularly constituted court of justice having jurisdiction and if found guilty subjected to the usual pain and penalties applicable to all persons alike for the offense charged, but not to be subjected to unusual punishment or to be tried by ordeal by the defendants. Those were their constitutional rights and privileges under the Federal Constitution.

12. The Court erred in refusing to grant defendant Pool's motion for a new trial, which was based in part upon the instruction set forth hereinabove in paragraph 11.

13. The Court erred in instructing the jury in the following manner:

But, as I said before, if Sage and Gaither were taken into custody by the defendant, under color of law, by reason of the positions held by the defendants, then the ordeal to which the defendant, Pool, subjected both Sage and Gaither and the ordeal to which the defendant, Clifton, subjected Sage at a

point near Nellis Air Force Base constituted a violation of the Federal statute.

14. The Court erred in refusing to grant defendant Pool's motion for a new trial, which was based in part upon the instruction set forth hereinabove in paragraph 13.

15. The Court erred in instructing the jury in the following manner:

In order to convict defendants Pool and Clifton under Count I it is necessary for the jury to find that the defendants had in mind the specific purpose of depriving Sage of a Constitutional right—that is to deprive him of the right to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed; and in order to convict Pool under Count II it is necessary for the jury to find that the defendant had in mind the specific purpose of depriving Gaither of a Constitutional right, that is, to deprive him of the right to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed.

16. The Court erred in refusing to grant defendant Pool's motion for a new trial, which was based in part upon the instruction set forth hereinabove in paragraph 15.

17. The Court erred in instructing the jury in the following manner:

If you find the acts alleged in the indictment to have been committed, then let me summarize the questions you have to determine:

As to Count I,

(1) Did defendants Pool and Clifton take Sage into custody under color of law?

(2) Did defendants Pool and Clifton specifically intend to deprive Sage of a constitutional right guaranteed to him by the United States Constitution?

(3) Has the government established these two foregoing essentials to your satisfaction beyond a reasonable doubt?

If the government has done so it is your duty to find the defendants guilty in this case. If you have a reasonable doubt upon either of the two essentials, it is your duty to acquit the defendants.

As to Count II,

(1) Did defendant Pool take Gaither into custody under color of law, and

(2) Did defendant Pool specifically intend to deprive Gaither of the constitutional right guaranteed to him by the United States Constitution?

(3) Has the Government established these two foregoing essentials to your satisfaction beyond a reasonable doubt?

If the Government has done so it is your duty to find the defendant guilty in this case. If you have

a reasonable doubt upon either of these two essentials, it is your duty to acquit the defendants.

18. The Court erred in refusing to grant defendant Pool's motion for a new trial which was based in part upon the instruction set forth hereinabove in paragraph 17.

/s/ MORTON GALANE,
Attorney for Defendant-
Appellant.

The undersigned Morton Galane, an attorney of record for the appellant herein, states that the attached Statement of Points on Appeal was this 4th day of February, 1958, served by Certified, Return Receipt Mail on the attorney for Respondent:

HOWARD W. BABCOCK,
Assistant United States
Attorney.

/s/ MORTON GALANE.

[Endorsed]: Filed February 6, 1958.

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15866

IRMGARD SANTOS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Petition to Review Decision of the Tax Court
of the United States

PETITIONER'S REPLY BRIEF

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May 15, 1958

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IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15866

IRMGARD SANTOS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

**Petition to Review Decision of the Tax Court
of the United States**

PETITIONER'S REPLY BRIEF

Petitioner's original brief was premised on the contention that the action of the Commissioner in reversing the credits herein involved was an effort on the part of the Commissioner to circumvent and nullify the decision of this Court. The Government's brief argues that the action of the Commissioner was neither intended to nor was, in fact, a contravention of this Court's earlier decision herein.

We believe it would be of assistance to the Court to point out the error of the Commissioner's position and to mention certain established rules dealing with the problem involved.

STATUTE PROHIBITS ABATEMENT OF JEOPARDY ASSESSMENT AFTER TAX COURT DECISION

It should be remembered that in this case a jeopardy assessment was made and a notice of deficiency issued on October 15, 1952, under the authority conferred by Sec. 273, Internal Revenue Code of 1939.

The taxpayer filed a timely appeal with the Tax Court. Thereafter, on December 30, 1954, the Commissioner collected the assessed transferee liability by means of crediting overpayments of income tax for the years 1945 and 1946 determined by the Tax Court as the result of a stipulation between the parties.

June 18, 1956, the Tax Court entered its decision that the petitioner was liable as transferee. The petitioner appealed to this Court which, on June 28, 1957, reversed the Tax Court. The opinion of this Court is set forth at pages 11-14 of petitioner's original brief.

On August 8, 1957, the District Director reversed the credits referred to above and applied them against the income tax liability of Lawrence Santos for 1945, despite the fact that this Court had held that the petitioner was not liable as a transferee of the assets of Lawrence Santos for 1945.

Thereafter, on August 28, 1957, the Tax Court in an *ex parte* action decided that petitioner was not liable as a transferee of the assets of Lawrence Santos for 1942 to 1946, inclusive. (R. 7)

On December 6, 1957, the Tax Court denied petitioner's motion that the decision of August 28, 1957, be vacated and an order entered determining that an overpayment was due petitioner in the amount of \$77,118.47. (R. 14)

The Internal Revenue Code of 1939 specifically provides in Sec. 273 (c) with respect to jeopardy assessments:

“The Commissioner may, at any time before the *decision of the Tax Court is rendered*, abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount.” [Italics supplied]

Sec. 273 (k) also specifically states:

“The Secretary may abate the jeopardy assessment if he finds that jeopardy does not exist. *Such abatement may not be made after a decision of The Tax Court of the United States in respect of the deficiency has been rendered * * **” [Italics supplied]

The language quoted above shows that Congress has specifically provided that, in the case of a jeopardy assessment, the Commissioner has no power to abate a tax after the Tax Court has rendered its decision. In other words, the action taken in this case is clearly prohibited by statute as well as by all possible conceptions of equity and fair dealing.

CASE LAW SUPPORTS PETITIONER

Even if the foregoing is disregarded, there is much law to support the petitioner's position in this case.

The United States District Court for the Southern District of California in *Western Wholesale Drug Co. v. United States* (1930), 47 F. (2d) 770, 9 A.F.T.R. 1013, said that a credit is “a final disposition of the assessment in question” and that the Commissioner did not have a lawful right to reverse such a credit.

The United States District Court for the Northern District of California on April 7, 1938, decided the case of *Maud Hemrich v. United States*, No. 20,300-R, 23 A.F.T.R. 1161. In that case, Judge Roche decided that an overpayment of taxes made by a wife on a separate return was refundable despite unpaid taxes due by the husband.

The Court of Claims has dealt with this question in at least two instances. In *Krug v. United States*, (1937) 18 F. Supp. 242, 18 A.F.T.R. 1256, it appears that a husband and wife made separate income tax returns. The Commissioner redistributed the income between the two returns, increasing that of the husband and decreasing that of the wife. The Court of Claims held that the wife was entitled to a refund, even though the deficiency could not be collected from the husband. The Court states (p. 248):

“The arbitrary refusal to make a refund to one spouse merely because collection cannot be made of a deficiency from the other spouse is unlawful and inequitable.”

In *Ina Claire v. United States* (1940), 34 F. (2d) 1009, 25 A.F.T.R. 892, the facts are somewhat similar to those here involved. The Court held that reversal of credits between husband and wife due to an inability to collect from one was void.

The Government's brief apparently is making an effort to have this Court reconsider the case on its merits, even though it did not appeal from the decision of the Tax Court. The Government's argument completely avoids the issues which this Court is asked to decide.

Certain fundamental rules govern.

If an appeal is taken to the Tax Court, the jurisdiction of the Tax Court is exclusive. The taxpayer is prohibited from bringing suit in any other court for the recovery of any tax where a notice of deficiency was mailed and a petition filed with the Tax Court. (Sec. 6212 (a), p. 11, original brief)

A decision of the Tax Court “is res judicata as to the questions involved in the computation and assessment of taxes for which a deficiency is claimed.” *United States ex rel Girard Trust Co. v. Helvering*, 301 U. S. 540.

The Court of Claims has stated the rule to be that the Tax Court has “exclusive power ultimately and finally to decide all questions, both as to deficiencies and overpay-

ments, that could arise between the taxpayer and the Government in connection with the tax liability for the year or years involved in such proceeding * * *". *Ohio Steel Foundry Co. v. United States* (1930), 38 F. (2d) 144, 148, 8 A.F.T.R. 10136, quoted with favor in *American Woolen Co. v. United States* (Ct. Cls. 1937), 18 F. Supp. 783, 789, 19 A.F.T.R. 63.

The Commissioner argues in effect that the litigation here involved should not be determinative of the petitioner's rights. He states that we should, in effect, forget this appeal and bring a suit in the District Court or the Court of Claims. *United States ex rel Girard Trust Co. v. Helvering*, 301 U. S. 540 and *Empire Ordnance Corp. v. Harrington*, 249 F. (2d) 680, are cited in support of this position. The sole question decided in both the *Girard* and *Empire* cases was that mandamus is not the correct procedure to compel the refund of overpayments determined by the Tax Court.

As indicated above, the Tax Court decision is res judicata as to the questions involved in the computation and assessment of taxes. We cannot sue for a refund in this case because the Tax Court has determined that there is no overpayment.

The Tax Court, in 1954, decided that the petitioner overpaid her income tax for the years 1945 and 1946 in the principal amounts of \$24,768.51 and \$38,237.18, respectively. (R. 13) The decision was entered as a result of a stipulation of the parties. The right of appeal, if any, has long since expired.

The Government apparently argues that we should sue in a District Court or the Court of Claims to compel payment of the income tax refunds determined for 1945 and 1946. Its brief indicates that it would then argue that, under the law, the petitioner herein is liable for taxes which have been assessed against her husband. The difficulty of the Government's position is that this Court, in the present proceeding, has determined that the petitioner

is not liable on account of her husband's taxes. This Court should not permit the Government to again litigate the point.

A further reason why the Government's position is untenable is that the Internal Revenue Code specifically provides for the issuance of a notice of deficiency with a right of appeal to the Tax Court if the Commissioner determines that a taxpayer is liable either for taxes or as a transferee. The Government cannot now issue a notice of deficiency against the petitioner because, having issued the notice which was the basis of this proceeding, it is prohibited from issuing another notice. (Sec. 6212 (c), Internal Revenue Code of 1954, Sec. 272 (f), Internal Revenue Code of 1939.)¹ Therefore, it is trying to enlist this Court's aid in an effort to avoid the statutory restrictions so that it may litigate the contention that the petitioner is liable under some kind of a construction of the Hawaiian Community Property laws.

CONCLUSION

The second decision of the Tax Court in this case should be reversed with instructions to the Tax Court to enter a decision that there is an overpayment of transferee liability in the amount of \$77,118.47, and such overpayment was paid by credit on September 30, 1954.

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¹ Sec. 272 (f), Internal Revenue Code of 1939 (The provisions of Sec. 6212 (c) Internal Revenue Code of 1954 are substantially the same):

“(f) Further Deficiency Letters Restricted.—If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of this section, and the taxpayer files a petition with the Tax Court within the time prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year,
* * *.”

In the United States Court of Appeals
for the Ninth Circuit

BERGARD SANTOS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15866

IRMGARD SANTOS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

PREVIOUS OPINIONS

The first findings of fact and opinion of the Tax Court (F.R. 46-65)¹ are reported at 26 T.C. 571.

The former opinion of this Court is reported at 246 F. 2d 204.

The Tax Court's decision on remand (R. 7) and order denying motion to vacate (R. 14-15) are unreported.

¹ F.R. refers to the record in the first appeal, Docket No. 15371, which record is used herein by stipulation. (R. 19-20.)

JURISDICTION

This review involves a decision of the Tax Court (R. 7) holding that the taxpayer, Irmgard Santos, is not liable as transferee for the unpaid income taxes of her husband, Lawrence Santos, for the taxable years 1943 to 1946, inclusive. On June 18, 1956, the Tax Court had entered a decision that taxpayer was liable, as transferee of the assets of her husband, for income taxes for such years in the amount of \$68,287.90, plus interest. (F.R. 65-66.) Taxpayer filed a petition for review with this Court, Docket No. 15371, and in an opinion dated June 28, 1957, this Court reversed the decision of the Tax Court (246 F. 2d 204). Pursuant to the mandate of this Court (R. 4-5) further proceedings were had in the Tax Court which vacated its earlier decision and, on August 29, 1957, held the taxpayer was not liable as a transferee (R. 3, 7). Taxpayer's motion to vacate this decision (R. 8-10) was denied on December 6, 1957, and the order entered on December 11, 1957 (R. 14-15). The petition for review was filed January 20, 1958. (R. 17.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court was correct in its holding pursuant to the mandate of this Court that taxpayer was not liable as a transferee of assets of her husband and in refusing to find an overpayment of transferee liability.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the Appendix, *infra*.

STATEMENT

Only the factual matters relevant to this review will be recounted here. The full statement of facts appears in the Tax Court's original findings of fact and opinion (F.R. 46-65), and in the opinion of this Court in the first review of this cause, 246 F. 2d 204.²

On or before October 15, 1952, the Commissioner, under Section 311 of the Internal Revenue Code of 1939, made a jeopardy assessment against taxpayer, Irmgard Santos, as transferee of the assets of her husband, Lawrence Santos, in the principal amount of \$68,287.90, on account of income taxes owed by him for the years 1943-1946. Interest on the transferee liability was assessed on the same date in the amount of \$26,605.15. (F.R. 46-47; R. 12.)

In an earlier Tax Court proceeding involving the individual income tax liability of taxpayer it was determined pursuant to a stipulation of the parties that there were overpayments of her income tax for the years 1945 and 1946 in the principal amounts of \$24,768.51, and \$38,237.18, respectively. (R. 13.)

The overpayments of income tax for the years 1945 and 1946 referred to were applied by the District Director at Honolulu, Hawaii, against the assessed transferee liability. This was done by the entry of two credits on the books of the District Director on

² This opinion is set out as an appendix to taxpayer's brief.

December 30, 1954, one in the amount of \$27,256.32, and the other in the amount of \$49,835.15. These credits represented the amounts of the overpayments for the two years, plus interest, and they together with a cash payment of \$27.00 made on September 26, 1956, equalled the amount of the jeopardy assessment plus interest. (R. 11, 13.)

In the meantime, or on October 15, 1952, the Commissioner issued a notice of deficiency to taxpayer as transferee of the assets of Lawrence Santos. (F.R. 47.) On January 8, 1953, taxpayer filed a petition with the Tax Court for a redetermination of this deficiency and on June 18, 1956, the Tax Court approved the Commissioner's determination. (F.R. 46-65.) On September 7, 1956, the taxpayer petitioned this Court to review the decision of the Tax Court and this Court reversed, holding that the Commissioner had not sustained his burden of proving that the taxpayer had received certain assets as a transferee of her husband's individual property rather than as her share of community property. (Br. 11-14.) The mandate was filed August 13, 1957. (R. 4-5.)

In the meantime, or on August 7, 1957, the District Director at Honolulu reversed the above referred to credits of \$27,256.32 and \$49,835.15 and applied them against the income tax liability of Lawrence Santos for 1945. (R. 12.)

Thereafter, or on August 21, 1957, the Tax Court ordered its prior decision vacated and the proceeding was placed on the motions calendar. (R. 3.) On August 26, 1957, the Commissioner filed a motion for entry of decision finding that there is no liability on the part of taxpayer as transferee of the assets of

Lawrence Santos for income taxes for the taxable years 1943 to 1946, inclusive. This motion recited that no part of the assessed deficiency had been paid. (R. 6.) Decision was entered in accordance therewith on August 29, 1957. (R. 7.)

On September 6, 1957, taxpayer filed a motion to vacate the above decision and for the entry of a decision of an overpayment on account of the alleged transferee liability in the amount of \$77,118.47, including interest (R. 8-10.)

In an order entered December 11, 1957, the Tax Court denied the motion to vacate on the ground that there was no overpayment in this case because of the reversal of the credits in the account of Irmgard Santos, transferee. (R. 14-15.)

SUMMARY OF ARGUMENT

All activities by the Commissioner or on his behalf subsequent to the decision of this Court upon the first review of this case have been completely consistent with that decision. Accepting the taxpayer's premise that the property she received from her husband was community property and that therefore there was no transferee liability, the credits to taxpayer's transferee account were reversed and applied to the husband's account on the theory that under Hawaiian law all community property was subjected to and charged with debts incurred in the production of income for the community. Thus, there would have been no refund made to taxpayer even had an overpayment been determined by the Tax Court since the fund with which the overpayment was made was itself charged

with her husband's tax liability. If taxpayer disagrees with the disposition of the overpayment adjudged in her favor in the earlier Tax Court case covering the years 1945 and 1946, an adequate remedy by suit has been provided.

The Tax Court's decision on remand was correct because the facts before it showed there was no overpayment in this proceeding at the time such decision was rendered. Accordingly, pursuant to the mandate of this Court, the decision of no transferee liability and no overpayment was correct.

ARGUMENT

I

The Reversal of the Credits To the Taxpayer's Account As Transferee Was Neither Intended To Be Nor Was It In Fact In Contravention of This Court's Earlier Decision Herein

There is no dispute as to the material facts. A notice of deficiency was issued to taxpayer as transferee of the assets of her husband, Lawrence Santos covering income taxes due from him for the years 1943 to 1946, inclusive. (F.R. 47.) After a jeopardy assessment, taxpayer's account as transferee was credited to the extent of certain overpayments for the years 1945 and 1946 which had been determined in her favor in a prior Tax Court case. (R. 15.) The Tax Court upheld the determination of the Commissioner in the instant case that taxpayer was liable as a transferee of the assets of her husband, but pursuant to a petition for review filed by the taxpayer, this Court reversed the decision of the Tax Court and

sent the case back for further proceedings in conformity with its opinion and judgment. (R. 4-5.)

The position of the taxpayer throughout was that the assets she admittedly received from her husband were not from his separate property so as to make her liable for his taxes as a transferee, but rather were merely the receipt of her share of community property under the controlling Hawaiian law. Thus, this Court phrased the issue in the first review as, "whether the Commissioner maintained his burden of proof that this money was not her community property and was received by her without consideration." 246 F. 2d 204, 205.

The Commissioner's position, pursuant to this Court's decision, was, of course, to accept the fact which has not been disproved, i.e. that the assets transferred to the taxpayer were in fact her share of community property. But, in addition, the Commissioner also took the position that since the same Hawaiian law which gave her these community rights also by Section 13(c) of the Community Property statute³ made this type of community property sub-

³ Section 13(c) of the Community Property statute of Hawaii provides:

(c) The community property shall be liable for debts contracted by the husband or by the wife or by both, and for liabilities of the husband or the wife or both arising out of tort or otherwise, in any transaction entered into or action taken by the husband or the wife or both relating to the management or control or disposition of or other dealing with or for the protection or benefit of the community property. With respect to the liability of community property for such debts and liabilities, no distinction shall be made be-

ject to and chargeable with the debts incurred in producing such community income, including the husband's liability for federal income taxes, then the assets transferred to taxpayer went to her charged with this latter liability. Accordingly, when it was determined that the assets were community property another fund was uncovered from which the husband's delinquent taxes could be collected. The statutory charge thus imposed has the effect of making the property itself primarily liable for the payment of the husband's taxes as debts earned in the production of community income.

The sense of Section 13(c) of the Community Property statute is obviously that when debts are incurred in the production of income which becomes community property by the operation of law, the community property shall be burdened with the discharge of these debts. Therefore, it was the Commissioner's position that the overpayment of taxpayer's 1945-1946 taxes, *which was directly traceable to assets of the community* (F.R. 52-54), should be directly applied to the husband's debts. This position was in no way a reassertion of the transferee liability contention rejected by this Court, and accordingly, could in no sense be said to be in contravention of this Court's opinion in the first proceeding.

Under the approach to the problem above outlined, the only question then presented was as to the correct procedural method to be followed in applying the over-

tween community property subject to the management and control of the wife and community property subject to the management and control of the husband.

payments to the husband's tax liability. Two possibilities were apparent: (1) To have an overpayment entered in this, the transferee proceeding, and subsequently refuse to make a refund on the ground that the assets were liable for and should be applied to the husband's unpaid tax liability; or (2) to reverse the credits in the transferee account and apply them to the husband's account directly on the same theory. The latter alternative was chosen (R. 13), herein.

It should be noted that in either alternative the taxpayer has the same remedy, i.e. a suit for refund allowed by Section 322(c) of the Internal Revenue Code of 1939, Appendix, *infra*,⁴ which provides that no suit for refund can be brought after petitioning the Tax Court *except* where a decision of overpayment by the Tax Court has become final.⁵ Under either of the above alternatives, this situation exists. Thus, if an overpayment was entered in this case, the taxpayer could sue for a refund under this provision when the Commissioner refused to refund the overpayment. On the other hand where the credits to the transferee account are reversed, it leaves the situation exactly the same, i.e. a decision of the Tax Court determin-

⁴ It would appear that this is the applicable statute herein. However, in all material respects it is the same as Section 6512(a) of the Internal Revenue Code of 1954 cited by taxpayer. (Br. 6-7.)

⁵ Taxpayer apparently does not recognize the application of this exception to Section 6512(a) since she alleges (Br. 6-7) that she will be without remedy unless an overpayment is found in this case. There is no substance to this objection because as pointed out above, there is still a decision of an overpayment that has become final.

ing an overpayment for the years 1945-1946 has become final and therefore suit will lie if the refund is not made.

Thus, even if the better procedure would have been to have allowed an overpayment to be entered in this case as taxpayer urgently requests (Br. 9), the entry of that overpayment would not have entitled taxpayer to a refund nor prevented the necessity of a suit for refund to adjudicate the correctness of the Commissioner's position. In any case only the Court of Claims or the proper District Court and not the Tax Court has the jurisdiction to compel a refund of taxes. See Section 322(d), Internal Revenue Code of 1939, Appendix, *infra*. It should be pointed out that a taxpayer's right to bring a suit for refund in this situation has received judicial approval. When the refund of an overpayment determined by the Tax Court is not made by the Commissioner for what appears to be some justifiable reason, the taxpayer's right to receive the refund is the proper subject of a suit in the District Court or Court of Claims—"And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, * * *." *U. S. ex rel. Girard Co. v. Helvering*, 301 U.S. 540, 543. To the same effect see *Empire Ordnance Corp. v. Harrington*, 249 F. 2d 680 (C.A. D.C.).

It is submitted that the procedure involved in this case was clearly permissible. The Commissioner's authority to reverse credits previously allowed has been specifically approved. *Commissioner v. Newport Industries*, 121 F. 2d 655 (C.A. 7th); *American Woolen Co. v. United States*, 18 F. Supp. 783, and

21 F. Supp. 1021 (C. Cls.). On rehearing of the last cited case the Court of Claims said (21 F. Supp, p. 1023): "Further argument, however, has convinced us that the Commissioner had the right to reverse the credit. * * * We think the right of the Commissioner to change his records is sustained by the decision of the Supreme Court in the case of *Daube v. United States*, 289 U.S. 367, * * *."

That the action of the District Director in reversing the credits herein was not in disregard of the decision of this Court is readily apparent. As explained above the theory on which the credits were reversed and applied to the husband's tax liability was based solely on the decision of this Court. If the theory applied is incorrect that fact must be proved in a suit for refund of the overpayments involved. Moreover, it is noteworthy in this regard that (after delivery of the mandate of this Court) the Commissioner himself moved the Tax Court to find there was no transferee liability (R. 6), hardly evincing, as taxpayer urges (Br. 5), a design by the Commissioner to avoid the same holding by this Court.

In view of the above, it is submitted that the reversal of the credits involved herein was within the authority of the Commissioner, was based on this Court's earlier decision, and has not in any way prejudiced the rights of the taxpayer.

II

The Tax Court Did Not Err In Determining There Was No Overpayment of Transferee Liability

On August 29, 1957, the Tax Court, pursuant to the mandate of this Court (R. 4-5), and, pursuant to

the motion of the Commissioner (R. 6), vacated its earlier decision that taxpayer was liable as a transferee of the assets of her husband and entered a decision of no transferee liability (R. 7). Later, on September 6, 1957, the taxpayer moved to vacate the decision of August 29, 1957, and for the entry of a decision of no transferee liability and an overpayment in the principal sum of \$77,118.47. (R. 8-10.) On December 6, 1957, the Tax Court denied this last referred to motion of the taxpayer with the statement "that there is no overpayment in this proceeding at this time." (R. 14-15.)

The inflammatory statements in taxpayer's brief (pp. 7-8) to the effect that the Tax Court was deliberately flaunting the mandate of this Court by the above outlined action are simply untrue. The Tax Court has jurisdiction under Section 322(d) of the Internal Revenue Code of 1939, Appendix, *infra*, to determine only the amount, if any, of an overpayment. In this case the only payment of the transferee liability occurred when the earlier overpayments in favor of the taxpayer for the years 1945 and 1946 were credited to the transferee account. After the credits had been reversed, the transferee liability had not been paid in any sense and the Tax Court's decision that there was no overpayment was entirely correct. The Tax Court could not have ordered the credits reinstated in the transferee account because it has no jurisdiction over the Commissioner's administrative actions in general. (*Commissioner v. Gooch Co.*, 320 U.S. 418; *Glowinski v. Commissioner*, 243 F. 2d 635 (C.A. D.C.); *Jones v. Commissioner*,

34 B.T.A. 280), and, specifically it cannot direct the Commissioner to credit an overpayment in a given manner, nor can it compel the Commissioner to pay over to a taxpayer in cash the amount thereof. *Heyl v. Commissioner*, 34 B.T.A. 223; *W. H. Hill Co. v. Commissioner*, 22 B.T.A. 1351, 23 B.T.A. 605, affirmed, 64 F. 2d 506 (C.A. 6th); *Anderson v. Commissioner*, 12 B.T.A. 1111.

Consequently, under the mandate of this Court which directed the Tax Court to have such proceedings as were in conformity with this Court's opinion and judgment, the Tax Court correctly held herein that there is no transferee liability and no over payment. Moreover, as we have pointed out above, if the taxpayer desires to litigate the correctness of the Commissioner's administrative action a proper and adequate statutory proceeding has been provided therefor.

CONCLUSION

For the reasons above submitted, the decision of the Tax Court is correct and should be affirmed.

CHARLES K. RICE

Assistant Attorney General

LEE A. JACKSON

ROBERT N. ANDERSON

JAMES P. TURNER

Attorneys

Department of Justice

Washington 25, D.C.

APRIL, 1958

APPENDIX

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * * *

(c) *Effect of Petition to Tax Court.*

If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272(a) and if the taxpayer files a petition with The Tax Court of the United States within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

- (1) As to overpayments determined by a decision of the Tax Court which has become final; and

* * * *

(d) [as amended by Sec. 5(c), Tax Adjustment Act of 1945, c. 340, 59 Stat. 517] *Overpayment Found by Tax Court.*

If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. * * *

(26 U.S.C. 1952 ed., Sec. 322.)

Revised Law of Hawaii (1945) :

Chapter 301A [as added by Act 273, Session Laws of Hawaii (1945)]. COMMUNITY PROPERTY.

* * * *

Sec. 13. Property subject to obligations. (a) The separate property of the wife shall be liable for debts contracted at any time by the wife and liabilities of the wife arising at any time out of tort or otherwise, including any such debts or liabilities by reason of any transaction entered into or action taken by the wife relating to the management or control or disposition of or other dealing with or for the protection or benefit of the community property, but shall not be liable for debts or liabilities of the husband.

(b) The separate property of the husband shall be liable for debts contracted at any time by the husband and liabilities of the husband arising at any time out of tort or otherwise, including any such debts or liabilities by reason of any transaction entered into or action taken by the husband relating to the management or control or disposition of or other dealing with or for the protection or benefit of the community property, but shall not be liable for debts or liabilities of the wife.

(c) The community property shall be liable for debts contracted by the husband or by the wife or by both, and for liabilities of the husband or the wife or both arising out of tort or otherwise, in any transaction entered into or action taken by the husband or the wife or both relating to the management or control or disposition of or other dealing with or for the protection or benefit of the community property. With respect to the liability of community property for such debts and liabilities, no distinction shall be made be-

tween community property subject to the management and control of the wife and community property subject to the management and control of the husband.

(d) As between the community property and the separate property of the wife or of the husband the community property shall be liable for the debts and liabilities referred to in paragraph (c) of this section.

(e) The earnings of the wife and the rents, issues, incomes and other profits of the separate property of the wife shall be liable for debts contracted by the wife prior to the inception of the community and the liabilities of the wife arising prior to the inception of the community out of tort or otherwise.

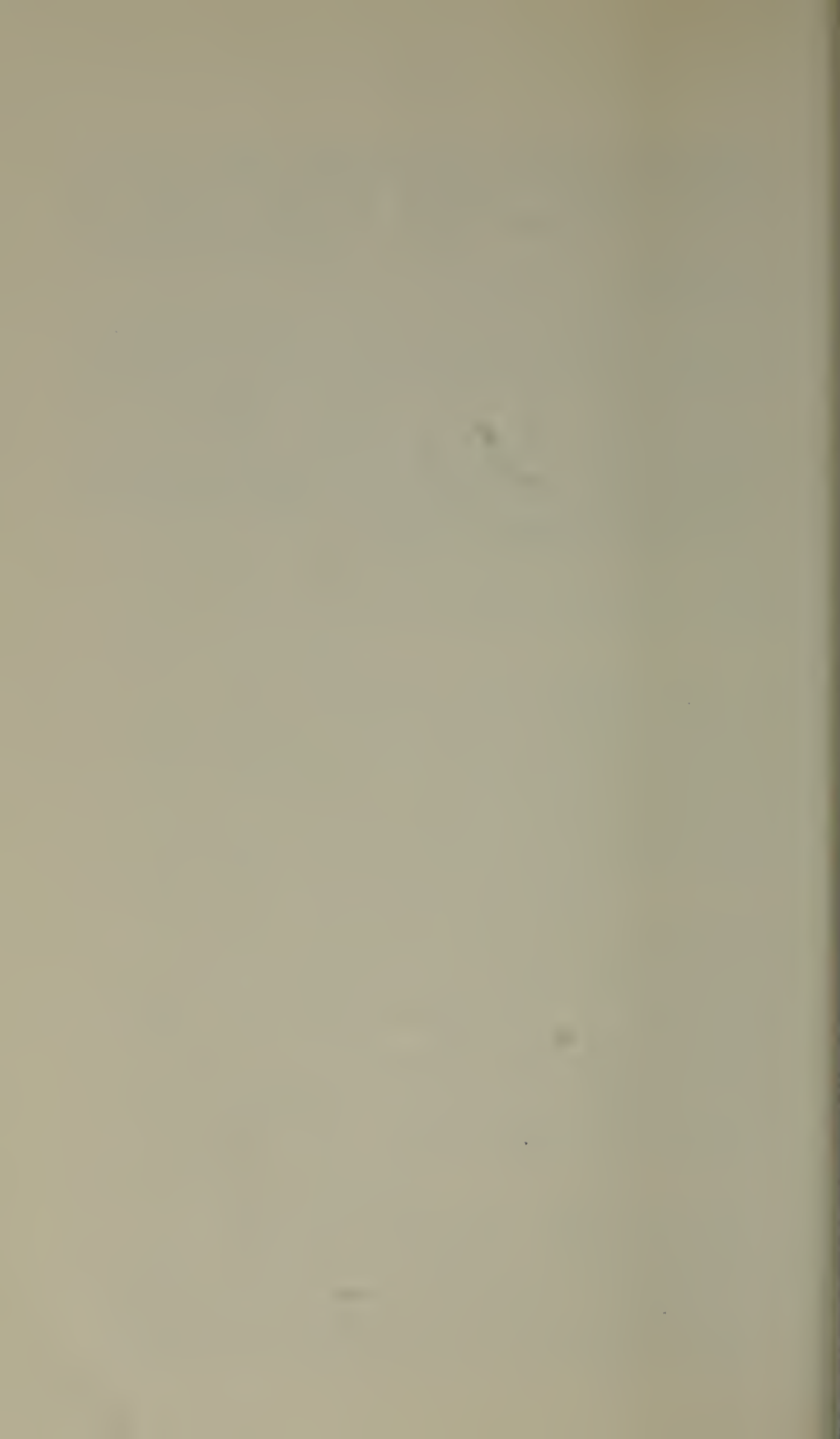
(f) The earnings of the husband and the rents, issues, incomes and other profits of the separate property of the husband shall be liable for debts contracted by the husband prior to the inception of the community and the liabilities of the husband arising prior to the inception of the community out of tort or otherwise.

(g) As between the community property and the separate property of the wife or of the husband, the separate property shall be liable for the debts and liabilities referred to in paragraphs (e) and (f) of this section. For the purposes of said paragraphs (e) and (f) the inception of the community shall be the marriage of the husband and wife or the effective date of this chapter, whichever is the later.

(h) Nothing in this section shall be deemed to affect or modify the obligation of the husband to support his wife and family and to discharge all debts contracted by the wife for necessities for herself and family during marriage; *provided*,

however, that if and whenever there is community property available for such purpose the husband shall be entitled to resort to such community property rather than to his separate property.

(i) Nothing in this section shall be deemed to prevent the wife or the husband from mortgaging or pledging her or his separate property or to prevent the wife and the husband from joining in a mortgage or pledge of community property as security for any indebtedness whether of the wife or of the husband or both.



No. 15866

United States
Court of Appeals
for the Ninth Circuit

IRMGARD SANTOS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

FILED

1958

PAUL P. O'BRIEN, CLERK

Petition to Review a Decision of the Tax Court
of the United States

No. 15866

United States
Court of Appeals
for the Ninth Circuit

IRMGARD SANTOS,

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Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

ROBERT ASH,
1921 Eye St., N.W.,
Washington 6, D. C.,
For the Petitioner.

HON. CHAS. K. RICE,
Assistant U. S. Attorney General;

LEE A. JACKSON,
Attorney,
Department of Justice,
Washington, D. C.,
For the Respondent.

Tax Court of the United States
Washington

Docket No. 46327

IRMGARD SANTOS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER

Pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit, filed with this Court August 13, 1957, whereby the decision of this Court in this case was reversed, it is

Ordered: That the decision of this Court entered June 18, 1956, is hereby vacated, and the proceeding is placed upon the Motions Calendar at Washington, D. C., at 10:00 a.m., October 30, 1957, for consideration of any recomputation, stipulation, or motion which may be filed with the Court by either party on or before October 23, 1957.

Dated Washington, D. C., August 21, 1957.

[Seal] /s/ C. P. LeMIRE,
Judge.

Served August 22, 1957.

Entered August 22, 1957.

United States Court of Appeals
for the Ninth Circuit

No. 15371

IRMGARD SANTOS,

vs.

COMMISSIONER OF INTERNAL REVENUE,

MANDATE

United States of America—ss.

The President of the United States of America
To the Honorable, the Judges of The Tax Court of
the United States

Greeting :

Whereas, lately in The Tax Court of the United States, before you or some of you, in a cause between Irmgard Santos, Petitioner, and Commissioner of Internal Revenue, Respondent, No. 46327, a Decision was duly entered on the 18th day of June, 1956; which said Decision is of record and fully set out in said cause in the office of the Clerk of the said Tax Court, to which record reference is hereby made and the same is hereby expressly made and the same is hereby expressly made a part hereof,

And Whereas, the said Irmgard Santos, Petitioner, petitioned to this court as by the inspection of the transcript of the record of the said Tax Court which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an ap-

peal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 5th day of June, in the year of our Lord, one thousand nine hundred and fifty-seven, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record,

On Consideration Whereof, It is now here ordered and adjudged by this Court that the Decision of the said Tax Court in this cause be, and hereby is reversed.

(June 28, 1957.)

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said petition for review notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the thirtieth day of July in the year of our Lord one thousand nine hundred and fifty-seven.

/s/ PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed August 13, 1957.

[Title of Tax Court and Cause.]

MOTION FOR ENTRY OF DECISION

Now Comes the Commissioner of Internal Revenue, by his attorney, Nelson P. Rose, Chief Counsel, Internal Revenue Service, and shows the Court that the liability of this petitioner found to be due in its decision entered June 18, 1956, was assessed under the jeopardy provisions of the Internal Revenue Code of 1939, and that no part of it has been paid.

Wherefore, the decision of this Court entered June 18, 1956, having been reversed by the United States Court of Appeals for the Ninth Circuit, respondent moves the Court to enter a decision finding that there is now no liability on the part of this petitioner as transferee of assets of Lawrence Santos for income taxes for the taxable years 1943 to 1946, inclusive.

/s/ NELSON P. ROSE,
Chief Counsel, Internal
Revenue Service.

Filed August 26, 1957, U.S.T.C.

Granted August 28, 1957, C. P. LeMire, Judge.

Served August 29, 1957.

Entered August 29, 1957.

The Tax Court of the United States, Washington

Docket No. 46327

IRMGARD SANTOS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit filed with this Court August 13, 1957, and the order of this Court dated August 21, 1957, the respondent filed a motion for the entry of a decision that there is no liability on the part of petitioner as transferee of assets of Lawrence Santos for income taxes for the taxable years 1943 to 1946, inclusive, which motion has been granted. It is, therefore,

Ordered and Decided: That petitioner is not liable as transferee of assets of Lawrence Santos for income taxes for the taxable years 1943 to 1946, inclusive.

/s/ C. P. LeMIRE,
Judge.

Served August 29, 1957.

Entered August 29, 1957.

[Title of Tax Court and Cause.]

MOTION TO VACATE DECISION
OF AUGUST 28, 1957

Comes now the above-named petitioner by her attorney, Robert Ash, and moves that the decision entered in this proceeding on August 28, 1957, be vacated and that a new decision be entered showing an overpayment of transferee liability.

The reasons for this motion are:

On August 21, 1957, this Court entered an order in this case which reads as follows:

“Pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit, filed with this Court August 13, 1957, whereby the decision of this Court in this case was reversed, it is

“Ordered: That the decision of this Court entered June 18, 1956, is hereby vacated, and the proceeding is placed upon the Motions Calendar at Washington, D. C., at 10:00 a.m., October 30, 1957, for consideration of any recomputation, stipulation, or motion which may be filed with the Court by either party on or before October 23, 1957.”

Despite the foregoing order, the Court, in an ex parte proceeding, without any notice to petitioner, on motion of the respondent, entered its decision, dated August 28, 1957, which reads as follows:

“Pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit filed with this Court August 13, 1957, and the order of this Court dated August 21, 1957, the respondent filed a motion for the entry of a decision that there is no liability on the part of petitioner as transferee of assets of Lawrence Santos for income taxes for the taxable years 1943 to 1946, inclusive, which motion has been granted. It is, therefore,

“Ordered and Decided: That petitioner is not liable as transferee of assets of Lawrence Santos for income taxes for the taxable years 1943 to 1946, inclusive.”

The said decision of August 28, 1957, should be vacated and a new decision entered showing an overpayment of tax liability because of the following facts:

On or before October 15, 1952, the respondent made a jeopardy assessment of alleged transferee liability in the case at bar in the principal amount of \$68,287.90. (See notice of deficiency.) Interest on account of the said jeopardy assessment in the amount of \$26,605.15 was likewise assessed.

In Tax Court Docket No. 42,682, Irmgard Santos v. Commissioner, this Court ordered, as a result of a stipulation of the parties, that there was an overpayment of Irmgard Santos' income tax for the taxable years 1945 and 1946 in the principal amounts of \$24,768.51 and \$38,237.18, respectively.

As a result of these overpayments, the District Director in Honolulu satisfied the alleged transferee liability by crediting the said overpayments of income tax as follows: A credit of \$27,256.32 resulting from the income tax overpayment for 1945 and a credit of \$49,835.15, plus an additional \$27.00 credit, resulting from the income tax overpayment for 1946. This means that the respondent has collected from the petitioner an amount totalling \$77,118.47 on account of the alleged transferee liability.

Unless this Court enters a decision showing not only a lack of alleged transferee liability but an overpayment on account thereof in the principal amount of \$77,118.47, the decision of August 28, 1957, will remain in effect and the respondent will not have the statutory authority to refund the overpayments of alleged transferee liability. See: Sec. 6512, Internal Revenue Code.

A copy of the statement of account as furnished the petitioner by the office of the District Director in Honolulu is attached hereto and made a part of this motion by reference.

Wherefore, it is prayed that this motion be granted.

September 6, 1957.

/s/ ROBERT ASH,

Attorney for Petitioner.

U. S. Treasury Department
Internal Revenue Service
District Director
Honolulu 13, Hawaii

July 19, 1957.

In Reply Refer to: C:AAA:BQ

Mrs. Irmgard Santos
1051 Fort St.
Honolulu, T. H.

Dear Mrs. Santos:

Reference is made to a request from Mr. Robert Ash, written on your behalf, relative to your income tax for the years 1945 and 1946.

The records in this office disclose the following information:

1945/IT #805300—Non taxable return.

	Debit	Date Paid	Credit	Balance	Date*
1945/IT #12/26/51					
Spl #2 02P	10,640.63	1/ 8/52	140.63		
Int.	3,690.26	1/ 8/52	235.91		
Accrued Int.	226.11	4/ 3/52	14,180.46	0.00	
1945/IT #9/12/52					
Spl #3 00P	41,618.34	4/ 3/52	19,130.81		
Int.	16,214.62	*Abated —	38,702.15	0.00	*12/30/54

Irmgard Santos—Transferee

	Debit	Date Paid	Credit	Balance	Date*
1945/IT #Mar.					
590018/54	68,287.90	*Credit —	27,256.32		*12/30/54
Int.	26,605.15	*Credit —	49,835.15		*12/30/54
		9/26/56	27.00	17,774.58	

Orig. 1945, #9/12/52 Spl #3 02P.

	Debit	Date Paid	Credit	Balance	Date*
1946/IT #July					
320010/47	17,713.49	9/26/47	2,500.00		
Int.	429.90	10/31/47	2,500.00		
		11/28/47	2,500.00		
		12/23/47	2,500.00		
		1/27/48	2,500.00		
		2/27/48	2,500.00		
		4/ 2/48	3,143.39	0.00	

#Apr 530065/48

Add'l. Int. 379.35 4/ 2/48 379.35

Very truly yours,

/s/ JOSEPH K. S. LUM,
Acting Chief, Collection Division.

Received and filed September 6, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

NOTICE OF FILING AND
HEARING MOTION

Please Take Notice the Petitioner has filed a motion in the above-entitled proceeding, a copy of which is enclosed herewith.

This motion has been placed on the Calendar for hearing October 30, 1957, before a Division of the Court at its Washington office, Constitution Avenue at 12th Street Northwest, at 10:00 a.m.

No further notice of this hearing will be sent.

/s/ HOWARD P. LOCKE,
Clerk.

Served September 12, 1957.

Entered September 12, 1957.

[Title of Tax Court and Cause.]

STIPULATION

It is stipulated and agreed by and between the parties hereto, through their respective counsel, that the following facts are true:

On or before October 15, 1952, the respondent made a jeopardy assessment against Irmgard Santos as transferee of the assets of Lawrence Santos in the principal amount of \$68,287.90. Interest on the said transferee liability was assessed on the same date in the amount of \$26,605.15.

In Tax Court Docket No. 42,682, Irmgard Santos v. Commissioner, it was decided, as a result of a stipulation of the parties filed July 15, 1954, that there were overpayments of Irmgard Santos' income tax for the calendar years 1945 and 1946 in the principal amounts of \$24,768.51 and \$38,237.18, respectively.

The overpayments of income tax referred to in the preceding paragraph were applied by the District Director at Honolulu, Hawaii, against the assessed transferee liability. This was done by the entry of two credits on the books of the District Director on December 30, 1954. One of the credits was in the amount of \$27,256.32 and represented the 1945 overpayment plus interest, and the other credit was in the amount of \$49,835.15 and represented the 1946 overpayment plus interest. In addition, a payment was made on the transferee liability on September 26, 1956, in the amount of \$27.00.

On August 7, 1957, the District Director at Honolulu, Hawaii, reversed the said credits of \$27,256.32 and \$49,835.15 and applied them against the income tax liability of Lawrence Santos for 1945.

/s/ ROBERT ASH,

Attorney for Petitioner.

/s/ NELSON P. ROSE,

Chief Counsel, Internal Revenue Service, Attorney
for Respondent.

Filed October 21, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

ORDER

Pursuant to the mandate of the United States Court of Appeals for the Ninth District reversing a decision entered the 18th day of June, 1956, this Court by order dated August 22, 1957, vacated its decision, placed the case on the motions calendar for October 30, 1957, and ordered the parties to file computations, or otherwise move in respect to the case on or before October 23, 1957.

On August 28, 1957, the Commissioner filed a motion setting forth that the liability found due from petitioner in this proceeding was assessed under the jeopardy provisions of the Internal Revenue Code of 1939, and that no part of it has been paid; and, requesting the Court to enter a decision that there is no liability on the part of petitioner as transferee of Lawrence Santos for income taxes for the years 1943 to 1946, inclusive.

That motion was granted, and on August 29, 1957, the Court entered its decision providing, in part, as follows:

“Ordered and Decided: That petitioner is not liable as transferee of assets of Lawrence Santos for income taxes for the taxable years 1943 to 1946, inclusive.”

On September 6, 1957, petitioner moved to vacate the decision entered on August 29, 1957, and for the entry of a decision of no transferee liability and an overpayment in the principal amount of \$77,118.47. The motion was placed upon the calendar for hearing on October 30, 1957.

On October 21, 1957, the parties filed a stipulation which, in substance, discloses that on October 15, 1952, the Commissioner made a jeopardy assessment against petitioner as transferee of assets of Lawrence Santos; that as a result of a stipulation decision was entered on August 10, 1954, in Tax Court Docket No. 42682, that there were overpayments of petitioner's income taxes for the years 1945 and 1946; that on December 30, 1954, the District Director at Honolulu, Hawaii, applied the overpayments in income taxes against such transferee liability by two credits aggregating \$77,091.47; that on September 26, 1956, he made an additional credit of \$27; and, that on August 7, 1957, the District Director reversed such credits and applied them against the income tax liability of Lawrence Santos for 1945. The manipulations of the Commissioner of the overpayments determined in a prior case now show that there is no overpayment in this proceeding at this time. Therefore, the premises considered, it is

Ordered: That petitioner's motion dated September 6, 1957, praying that the decision of this Court entered herein on August 29, 1957, be vacated and for other relief, be and the same in all respects is hereby denied.

/s/ C. P. LeMIRE,
Judge.

Dated: Washington, D. C., December 6, 1957.

Served December 11, 1957.

Entered December 11, 1957.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 51, inclusive, constitute and are all of the original papers on file in my office as called for by the "Substituted Designation of Contents of Record on Review," including exhibit 1-A attached to the stipulation of facts, petitioner's exhibit 2, admitted in evidence, and respondent's exhibits B through R, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 14th day of January, 1958.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15866. United States Court of Appeals for the Ninth Circuit. Irmgard Santos, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed January 20, 1958.

Docketed January 28, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

Tax Court Docket No. 46327

IRMGARD SANTOS,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

STATEMENT OF POINTS

The points on which petitioner intends to rely on this appeal from the opinion and final order and decision entered by the Tax Court of the United States are:

1. The Tax Court erred in ordering and determining that the petitioner had not overpaid her transferee liability.

2. The Tax Court erred in approving the action of the District Director in Honolulu in reversing, subsequent to the opinion of this Court on the prior appeal, the credits which he had previously made in satisfaction of petitioner's alleged transferee liability.

3. The Commissioner is in contempt of this Court by approving the action of the District Director in reversing the credits applied in satisfac-

tion of petitioner's alleged transferee liability and applying the said credits to the tax liability of petitioner's husband for the year 1945. The prior decision of this Court held that petitioner is not liable as a transferee of the assets of her husband.

4. The Tax Court's opinion and decision are not supported by the evidence.

5. The Tax Court's opinion and decision are contrary to law.

Respectfully submitted,

/s/ ROBERT ASH,

Attorney for Petitioner on
Review.

Service of copy acknowledged.

[Endorsed]: Filed January 20, 1958.

[Title of Court of Appeals and Cause.]

STIPULATION OF THE PARTIES

It is stipulated and agreed by and between the parties hereto that the printed record in the case of *Irmgard Santos v. Commissioner of Internal Revenue*, No. 15371, shall be considered by the Court in connection with the present appeal.

/s/ ROBERT ASH,

Attorney for Petitioner on
Review.

/s/ CHARLES K. RICE,
Assistant Attorney General, Washington, D. C., At-
torney for Respondent on Review.

So Ordered:

/s/ WILLIAM DENMAN,

/s/ WALTER L. POPE,

/s/ JAMES ALGER FEE,

United States Circuit Judges.

[Endorsed]: Filed February 5, 1958.

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No. 15870
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

L. D. REEDER CONTRACTORS OF ARIZONA, an Arizona
corporation,

Appellant,

vs.

HIGGINS INDUSTRIES, INC., a Louisiana corporation,

Appellee.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an appeal by L. D. Reeder, contractors of Arizona (hereinafter referred to as "Reeder"), plaintiff below, from an order of the United States District Court for the Southern District of California, Central Division, William M. Byrne, Judge, dismissing the action below as to the appellee-defendant, Higgins Industries, Inc. (hereinafter referred to as "Higgins"), on the ground that the said court could not acquire jurisdiction over Higgins.

The jurisdiction of the court below was founded upon Section 1332 of Title 28, United States Code. This action is one in which there is diversity of citizenship between all parties; Reeder is an Arizona corporation,

Higgins is a Louisiana corporation, and McCauley Lumber and Flooring Co., Inc., the co-defendant below, is a California corporation [R. 1, 2].

Higgins filed a motion to dismiss and to quash service; affidavits were filed; the motion was granted on November 1, 1957 [R. 85]; the formal order granting the motion and dismissing the action as to Higgins was filed November 25, 1957 [R. 87]; Reeder filed its notice of appeal on December 26, 1957 [R. 88], and the cause was docketed in this court.

The jurisdiction of this court is based upon Section 1291 of Title 28, United States Code.

Statement of the Case.

Appellant, as plaintiff, filed the action below against appellee Higgins, the manufacturer, and McCauley Lumber and Flooring Co., Inc. (hereinafter referred to as "McCauley"), the wholesaler, of Higgins wooden flooring block which proved highly defective [R. 1-19].

Higgins moved to dismiss on numerous grounds, particularly that it was a foreign corporation, not amenable to service of process in California [R. 20-22]. Affidavits in support of the motion were filed on August 26, 1957 [R. 23-46], and September 5, 1947 [R. 47-49].

Appellant filed affidavits in opposition to the motion on October 11, 1957 [R. 50-68], and Higgins filed supplemental affidavits in support of the motion on October 23 and October 25, 1957 [R. 69-82, 83-84].

The matter having been submitted for decision, the court below, by minute order, ordered the motion granted "on the ground that the court does not have jurisdiction over said defendant [Higgins] because it is not doing

business in the State of California" [R. 85]. The formal order was filed, dismissing the action as to Higgins on November 25, 1957 [R. 86-87].

The *uncontradicted* facts appearing from the affidavits are:

a. Higgins has shipped into California, at a conservative estimate, one million dollars worth of its merchandise per year for the past two years; its volume of California business has been expanding since 1951 [R. 50, 61].

b. Officers of Higgins have made at least three visits to California in recent years in connection with its business [R. 70, 72, 51, 65, 67]; that the said officers did the following in furtherance of Higgins' business:

(1) Conferred and consulted with salesman of McCauley concerning sales and merchandising matters and techniques of application of Higgins' product, and consulted with employees of a flooring applicator concerning construction jobs and details of its business, and visited customers of McCauley in connection with sales [R. 51, 70, 73].

(2) Visited the office of appellant at Los Angeles in connection with shipping advices for the block which gave rise to this action, threatening to cancel unless shipment was requested immediately, and discussed a construction project in which appellant was interested [R. 65-68; 53]; the officer stated that he would personally check the progress of construction at the job involved in this suit, but neglected to do so [R. 53, 66, 70].

c. Higgins has advertised and continues to advertise on a wide scale in national and trade maga-

zines having circulation in California [R. 51-52, 60, 70]; the inquiries resulting from such advertising are sent to the distributors in California for sales follow-up as a regular course of business [R. 58, 60-61, 70]. In addition, in connection with advertising and solicitation of sales in California, Higgins:

(i) Supplies advertising mats to its distributors here for advertising in local media [R. 52, 61];

(ii) Supplies advertising brochures [R. 61];

(iii) Supplies funds to the Hardwood Flooring Council of Southern California for the promotion of hardwood products as a flooring material, as a result of which Higgins Block is exhibited by the Council at home shows and fairs in this area [R. 52, 62, 70-71, 73-75];

(iv) Higgins keeps informed as to construction projects in the offing; it keeps close contact with its distributors and urges its distributors to have their customers bid on the same [R. 62, 60];

(v) Higgins directly solicits owners and architects in order that its product may be specified for use in a particular project, as is shown by the fact that its representative contacted the owner and architect of the construction project for which the material involved in this action was ordered [R. 24]; thereafter, it checks through its distributors on progress, as it did in this instance [R. 53]; follows through on the shipping of the material involved (*supra*, b(2)), and even meets with the owners and

architect when complaint is made as was done when the material shipped to appellant proved defective [R. 54].

In addition to the above, certain *controverted* facts are of importance:

(1) The distributors, including McCauley, ordered from Higgins, as a general rule, F.O.B. Los Angeles, and have acted in accordance therewith [R. 52-53, 55, 58, 60]. Typically, orders upon Higgins are specifically marked F.O.B. point of delivery [R. 28, 29, 55], but the acknowledgements are equivocal as to passage of title [R. 31, 32, 33, 34, 56]. Higgins, on the other hand, contends that all shipments are F.O.B. Louisiana [R. 24, 35, 48, 71, 73, 84].

(2) The distributors aver that they have adjusted customer complaints on Higgins' behalf and at its expense [R. 54, 58-59, 61], which is denied in the conjunctive [R. 75].

In connection with the question of passage of title and F.O.B. provisions, it is interesting to note that the documents indicate that the minds of the parties did not meet, and therefore title did not pass until acceptance in California.

Specification of Error.

I.

The court below erred in holding that appellee was not doing business in the State of California.

II.

The court below erred in holding that appellee was not amenable to process issued by a court sitting in California.

ARGUMENT.

A. Service Upon Higgins Will Not Violate Due Process.

In a decision rendered as recently as December, 1957, the United States Supreme Court has reclarified the due process requirements in connection with service upon a foreign corporation. In *McGee v. International Life Insurance Company*, 78 S. Ct. 199, 2 L. Ed. 2d 223, the court stated:

“Since *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned ‘consent,’ ‘doing business,’ and ‘presence’ as the standard for measuring the extent of state judicial power over such corporations. See *Henderson*, the Position of Foreign Corporations in American Constitutional Law, c. V. More recently in *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, the Court decided that ‘due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”’ *Id.* 326 U. S. at page 316, 66 S. Ct. at page 158.

“Looking back over this long history of litigation a trend is clearly discernible toward expanding the

permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

“[3] Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that state.”

In the *McGee* case, the foreign corporation had, by mail, offered to continue a contract of insurance which a California insured had previously entered into with another insurance company. The insured mailed his premiums from California to Texas, the home of the insurance company, and these relatively few mail transactions were all that occurred. The Supreme Court noted that the record failed to disclose that the insurance company had ever solicited or done any insurance business in California apart from the policy involved in that case. Nevertheless, it held that the requirements of due process had been met where the insurance company had been served by mail with process issuing from a California court.

Upon a reading of the *McGee* case, it is clear that appellee Higgins has more than sufficient contact with the State of California under the due process requirements, so that substituted service upon it issued by a court sitting in California would be valid.

B. Under California Law, Higgins Is Amenable to Service of Process.

The California courts have been unequivocal in asserting jurisdiction to the extent permitted by due process of law.

The California statutes authorize service of process on foreign corporations that are "doing business" in the State. The term "doing business" is a descriptive one which the courts have equated with such minimum contacts with the State "that the maintenance of the suit does not offend internal 'traditional notions of fair play and substantial justice.'" (*International Shoe Co. v. Washington*, 326 U. S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057.)

"Doing business" within the meaning of the California statutes is synonymous with the power of the State to subject foreign corporations to local process; in other words, the limits of "doing business" are those of due process.

Eclipse Fuel etc. Co. v. Superior Court, 148 Cal. App. 2d 736, 738, 307 P. 2d 739.

See also:

Gray v. Montgomery Ward, Inc., 155 Cal. App. 2d, 317 P. 2d 114;

McClanahan v. Trans-America Ins. Co., 149 Cal. App. 2d 171, 172, 307 P. 2d 1023;

Jeter v. Austin Trailer Equipment Co., 122 Cal. App. 2d 376, 387, 265 P. 2d 130;

Kneeland v. Ethicon Suture Laboratories, Inc., 118 Cal. App. 2d 211, 218-224, 257 P. 2d 727, and cases cited;

LeVecke v. Griesedieck Western Brewing Co., 233 F. 2d 772, 775;

Kenny v. Alaska Airlines, Inc., 132 Fed. Supp. 838, 850.

Indeed, the California Supreme Court, in a case decided March 26, 1958, has stated that:

“Whatever limitation it [‘doing business’] imposes is equivalent to that of the due process clause.”

Henry R. Jahn & Son v. Superior Court, 49 A. C. 881, 884.

The *Jahn* case above cited is an excellent example of the attitude of the California courts. The dissent in that case (pp. 888-889 of 49 A. C.) accuses the court of holding that all persons residing and doing business outside California who place orders for goods in this State and arrange for the delivery of such goods, will be subject to suit in California. Apt illustrations of the California law, which govern the decision of this case, are to be found in *Duraladd Products Corp. v. Superior Court*, 134 Cal. App. 2d 226, 285 P. 2d 699, and *Gray v. Montgomery Ward, Inc.*, 155 Cal. App. 2d, 317 P. 2d 114 (reversing the court below).

C. If Higgins Is Amenable to Service of Summons Issued by a California Court, It Is Amenable to Service of Process Issued by the Court Below.

Rule 4(7) of the Federal Rules of Civil Procedure provides that summons and complaint may be served upon a foreign corporation

“in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the court of general jurisdiction of that state.”

State law, particularly in a diversity case, governs the construction of this section. (*Kenny v. Alaska Airlines, Inc.*, 132 Fed. Supp. 838.)

D. Conclusion.

The law has developed and broadened in connection with modern concepts of due process in an advanced economy. It is clear that Higgins' activities in the State of California have established such contacts with this State, and with the transaction involved in this action, as to render it amenable to service of process here. Higgins, by reason of its activities here, will not be prejudiced by defending the action in California. It is respectfully submitted that the trial court erred, and must be reversed.

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No. 15870
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

L. D. REEDER CONTRACTORS OF ARIZONA, an Arizona
corporation,

Appellant,

vs.

HIGGINS INDUSTRIES, INC., a Louisiana corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

FILED

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Appellee.

APPELLANT'S REPLY BRIEF.

Preface.

Prior to the main portion of this brief, a few brief comments may be in order.

In the first place, the facts as set forth in Appellant's Opening Brief are fully supported by the references to the record, and have been checked with care. They are accurate.

Further factual statements, appearing herein, will also bear references to the record.

ARGUMENT.

I.

Appellee's brief deprecates the very substantial factors which are present here, and which must be considered in determining whether appellee is amenable to service of process in California. These may be grouped as:

1. SUBSTANTIAL CONTACTS APART FROM THE MATTER IN SUIT.

The record shows that, without regard to any matter directly connected with this litigation, appellee

a. Ships one million dollars worth of merchandise into California concurrently, and has been increasing this volume since 1951.

b. Officers of appellee visited California in 1954 and 1955 [R. 70, 72] (this action concerns events in the latter half of 1954 and early 1955);

c. Officers of appellee furnished technical advice in California concerning its products [R. 51];

d. Officers of appellee checked on sales and merchandising techniques of its product in California [R. 51, 70, 73];

e. Officers of appellee have dealt directly with customers of its product in California [R. 51];

f. Appellee furnished advertising mats and brochures for use in California [R. 52, 61];

g. Appellee advertises in publications having circulation in California, and forwards the inquiries therefrom to California for sales promotion [R. 51-52, 58, 60-61, 70];

h. Supplies funds for promotion of hardwood flooring in California, including exhibition of its products here [R. 52, 62, 70-71, 73-75];

i. Maintains close contact with its distributors and large construction projects, to promote sales in California [R. 60, 62].

2. SUBSTANTIAL CONTACTS WITH CALIFORNIA RE MATTER IN SUIT.

Unquestionably, the block which was defective was ordered for use in Arizona. However, appellee fails to mention:

a. Appellant, in California, ordered the block from McCauley Lumber and Flooring Co., Inc., a California corporation, located at Whittier, California [R. 64];

b. McCauley, from California, received by telephone from Appellee details of the Arizona project and a quotation [R. 53]; McCauley placed its orders from California [R. 28-30];

c. Appellee's officer, Edwin P. Crozat, visited appellant at Los Angeles in connection with the very matter in suit, and made direct representations as to what it required done [R. 53, 65-68], accompanied by a McCauley salesman;

d. McCauley acted for, and in connection with, appellee [R. 4-5, 45-46].

3. OTHER IMPORTANT FACTORS.

a. McCauley Lumber and Flooring Co., Inc. is a California corporation, and a codefendant herein. It has filed a cross-claim against appellee.

b. The officers of appellant are located in California and are residents of California; the sales and purchasing departments of appellant are located in California, and its books and records are maintained in California [R. 63-64].

As the Supreme Court has stated, in *International Shoe Co. v. Washington*, 326 U. S. 310, 319, 66 S. Ct. 154, 159:

“Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”

The same court pointed out in *McGee v. International Life Insurance Company*, 355 U. S. 220, 78 S. Ct. 199, 201, that modern transportation and communication have made it much less burdensome for a party to defend itself in a State where it engages in economic activity.

Certainly, the facts grouped at 1., *supra*, show that California is a state in which appellee engages in economic activity on a very large scale. It, and its officers, seem to experience little difficulty in coming to California in order to promote business; and the affidavits do not disclose that defending an action in California would be in any way burdensome.

The facts set forth under 3., *supra*, are also of great importance. To begin with, appellee's co-defendant below is a California concern, and must be sued here. As the California Supreme Court stated, in *Henry R. Jahn and Son v. Superior Court*, 49 A. C. 882, 887, 888, 323 P. 2d 437, 441, 442:

“It also bears emphasis that if plaintiff were unable to bring an action against Jahn here, it would be

similarly frustrated with regard to Jahn's co-defendants in New York. Two actions instead of one would then be necessary to litigate the existence or nonexistence of a single tortious conspiracy. . . .

Jahn's burden of defending here is no greater than plaintiff's burden of suing in New York. The cause of action is directly *related to Jahn's dealings with the California plaintiff and the California defendants*. A denial of jurisdiction would lead only to a duplicity of litigation. "[T]he quality and nature of the activity in relation to the fair and orderly administration of the laws' fully justifies subjecting Jahn to the jurisdiction of our courts."

The same considerations were considered and weighed in *Gordon Armstrong Company v. Superior Court*, 160 A. C. A., 325 P. 2d 21. In that case also, a California co-defendant was involved, and the court took note that duplicity of litigation would result if jurisdiction were denied. The court also noted that the evidence and witnesses were available in California, and took notice that these considerations were applicable in determining what action best comports with "traditional notions of fair play and substantial justice." The facts of that case are less compelling than those here, where the major activity of the foreign corporation was solicitation by advertising and direct mail. (See the affidavit and statement at 323 P. 2d, pp. 22-23.)

In the instant case, the contacts are necessarily multi-state, but the action has greater ties with California. Not only is one defendant here, a great number of the witnesses and documentary evidence here; but there are numerous direct contacts with California relating directly to the transaction in suit. Not only were all the negotia-

tions conducted in California (including telephone contacts between Whittier, California and Louisiana), and all of the orders prepared here, but there was direct contact between an officer of appellee and appellant in California concerning the order.

Taking all of these facts in context, it is submitted that traditional notions of fair play and justice require that suit be had in California; that denial thereof would lead to duplicity of litigation; that the quality and nature of appellee's activity here in relation to the fair and orderly administration of the laws more than justifies jurisdiction here; and that, to the extent that the practical considerations implicit in the doctrine of *forum convenien* are relevant, the balance is clearly in favor of a trial on the merits here.

II.

Appellee also raises the question of venue. Of course, the court below dismissed on the jurisdictional ground [R. 85, 87]. Assuming that venue were improper, the court below could either transfer or dismiss (28 U. S. C. §§1404, 1406); the court held, however, that it lacked jurisdiction over appellee, and dismissed on that ground alone. It did not decide the venue question. If appellee is doing business in California, as assuredly it is, venue is proper (28 U. S. C., §1391).

Respectfully submitted,

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No. 15,870

**UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

**L. D. REEDER CONTRACTORS OF ARIZONA, an
Arizona corporation,**

Appellant,

versus

**HIGGINS INDUSTRIES, INC., a Louisiana corporation,
Appellee.**

**Appeal from the United States District Court for the
Southern District of California, Central Division.**

REPLY BRIEF ON BEHALF OF APPELLEE.

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Appellee.

Appeal from the United States District Court for the
Southern District of California, Central Division.

REPLY BRIEF ON BEHALF OF APPELLEE.

MAY IT PLEASE THE COURT:

We believe that the facts of this case should be some what amplified over the statement in appellant's brief. The petition specifically alleges that the Rental Development Corporation of America, an Arizona corporation, entered into a contract with the Rubenstein Construction Company, an Arizona corporation, to act as general contractors to erect a rental project near Arizona. It is further alleged that Higgins Industries, Inc. contacted the owner and ar-

chitect of the said development project. There is no statement in Articles 6 or 7 of the petition to the effect that anyone was solicited for sales of this particular block in California. This particular block actually was delivered in Arizona. We reiterate the building project was in Arizona; the appellant is an Arizona corporation and the block was not delivered in California. These facts were not changed by the affidavits offered by the appellant.

Affidavits were filed by appellee to the effect that Higgins Industries, Inc. did no business in California; that it was engaged in interstate commerce; that it had no paid representatives whatever in the State of California; that it did not regularly and systematically solicit orders in California; that any and all goods shipped to California were goods in interstate commerce; that it had no brokers soliciting orders, nor did it have any office, sample room or any person regularly employed to give advice to users of Higgins block flooring or to adjust claims in the State of California. The flooring block was not sold to L. D. Reeder but was sold to the McCauley Lumber & Flooring Company who sold to L. D. Reeder. The merchandise at the time of the supposed sale to L. D. Reeder was not in California so title did not pass in California but was being shipped to L. D. Reeder, an Arizona corporation, in Arizona.

Higgins Industries, Inc.'s motion to dismiss was based upon the fact that it was at no time doing business in the State of California other than selling

flooring in interstate commerce; that all sales were completed within the State of Louisiana, and that under California law it is not amenable to suit in California, but that, under the circumstances, even if California law allowed suit in the State of California, such statute would be unconstitutional; further the federal district court did not have jurisdiction because of improper venue.

ARGUMENT.

The undisputed and uncontroverted fact is that there was no privity of contract between appellant and the appellee. The affidavit of William S. Reeder, R. 64, is to this effect:

“That L. D. Reeder Contractors of Arizona, through its purchasing and production manager, purchased the wood block flooring involved in this action from McCauley Lumber and Flooring Company at Los Angeles, California * * *.”

There can be no dispute but that L. D. Reeder was an Arizona corporation, and that there were other companies in existence, namely, L. D. Reeder of Los Angeles, L. D. Reeder of Sacramento, L. D. Reeder of Portland. There can be no controversy as to the fact that the appellant was doing business in the State of Washington as well as Arizona, so that this is not the case of an individual plaintiff domiciled and residing in a state who is bringing a suit at his place of domicile against a corporation with whom he has entered into a contract or is the purchaser and owner

of a piece of machinery, equipment or device which was being used in the State of California and which caused the damage in the State of California. This case is different from any case that we have read for that reason.

The appellant lays stress on the fact that officers of Higgins Industries, Inc. made at least three visits to California in recent years. Appellee wishes to point out that these visits were made over a four year period. The fact is that none of the company's three salesmen were assigned to California; that the President, Frank O. Higgins, had never been in California to solicit orders, and that Roland C. Higgins and Edwin P. Crozat had been there respectively twice and once, but that all was at the time of the inception of the company. Higgins Industries, Inc. was incorporated in 1954.

The appellant further states that certain facts are undisputed but the appellee specifically states that the facts set forth on page 3 of the brief under section B, subsections 1 and 2, are not accurate statements and are not admitted. It is submitted that these allegations would leave the impression that this was a continuous policy. It is not and as a matter of fact the only time this was done at all, if then, was at the inception of the company. It is further submitted that in view of the findings of the judge these facts as set forth by Higgins must be accepted as proven. The affidavits of the officers of Higgins Industries, Inc. show that this was never done in California by anyone

living in California or representing Higgins there. The distributors have never settled complaints for Higgins' benefit but only for their own benefit since they sold the blocks. Under the facts Higgins must have told them that if they settled with the ultimate purchaser that then an allowance would be made to them.

III.

There is no personal jurisdiction over a foreign corporation where it is neither licensed to do nor is doing business within a state. Such foreign corporation is not amenable to service of process. In the absence of consent, service of process upon a foreign corporation in an action in personam is invalid under the due process clause of the United States Constitution, Amendment 14, 1, unless the corporation is "doing business" in the jurisdiction where the action is filed.

Dismanta v. Nehi Corporation, 171 Fed. 2d. 696.
International Shoe Co. v. Washington, 326 U. S.
 210; 66 Supreme Court 154; 90 Law Ed. 95.

*Travelers Health Association v. Commonwealth
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*Boston Packaging Machinery Co. v. Woodman
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Perkins v. Louisville and M. R. Co., 94 Fed.
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West Publishing Co. v. Superior Court, 20 Cal.
 2d 720, 726-7.

HIGGINS INDUSTRIES, INC., DOES NOT DO BUSINESS WITHIN THE STATE OF CALIFORNIA SUFFICIENT TO MAKE IT AMENABLE TO SUIT THEREIN.

This question resolves itself into two parts; first, is Higgins Industries, Inc., doing business sufficiently to bring it within the statute of California, and, secondly, if so, would such a suit violate the Constitution of the United States? A discussion of these questions is to be found in the case of *Pulson v. American Rolling Mill Co.*, 170 Fed. 2d 193, decided by the Court of Appeals for the First Circuit. In this case the Court says:

"This case is brought solely on diversity grounds in a federal court sitting in Massachusetts. Rule 4(d) and (7) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides that service on a foreign corporation is valid if made in the manner prescribed by any statute of the United States or in any manner prescribed by the law of the state in which service is being made. There being no federal statute applicable, and service having been attempted under Massachusetts procedure, the case is governed by the requirements of valid service in that state."

There are two parts to the question of whether a foreign corporation can be held subject to suit within the state. The first is a question of state law. Has the state provided for bringing the foreign corporation into the courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it

so chooses is a matter for the law of the state as enacted by its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise as to whether such attempts violate the due process clause of the interstate commerce clause of the Federal Constitution. This is a federal question, and, of course, the state authorities are not controlling, but it is a question which is not reached for decision until it is found that the state statute is broad enough to assert jurisdiction over the defendant in a particular situation. The Court in the above cited case then went on to hold that under the state law of Massachusetts the courts have limited it not to cover the case of a foreign corporation which is engaged solely in solicitation of interstate commerce within the state.

The first question, therefore, to be determined is whether under California law the defendant corporation is doing sufficient business to allow it to be sued there. It is submitted that under the statutes and decisions of the State of California it is not subject to suit in California. We think that a determination of the California law on this question has been made by the United States District Courts of California in the following cases:

Moore Machinery Co. v. Stewart Warner Corp., 27 Fed. Supp. 526, and

Perkins v. Louisville & N. R. Co., 94 Fed. Supp. 946. In that recent case the Court said:

“The California courts have had numerous occasions to pass upon the question now before us. It has been said that to be doing business in California in a jurisdictional sense, a foreign corporation must transact in this state some substantial part of its ordinary business through its agents or officers selected for that purpose. *Jameson v. Simonds Saw Co.*, 1906, 2 Cal. App. 582, 84 P. 289; *Milbank v. Standard Motor Const. Co.*, 1933, 132 Cal. App. 67, 22 P. 2d 271; *Charles Ehrlich & Co. v. J. Ellis Slater Co.*, 1920, 183 Cal. 709, 192 P. 526; *Davenport v. Superior Court*, 1920, 183 Cal. 506, 191 P. 911. A California Court has recently held that a foreign manufacturing corporation was present within the state through the activities of its distributors who acted as agents although not intended to be such. *Thew Shovel Co. v. Superior Court*, 1939, 35 Cal. App. 2d 183, 95 P. 2d 149. See also *West Pub. Co. v. Superior Court*, 1942, 20 Cal. 2d 720, 128 P. 2d 777.

“From these cases it is apparent that California courts take a broad view of the concept of doing business by a foreign corporation, and although no California case has been found which involved mere solicitation, it is the view of this court that under California law the continued solicitation of business by a foreign corporation maintaining a regular office within this state constitutes doing business and renders the foreign corporation present in the State of California and amenable to its process.”

The first case held that there must be something more than mere solicitation by a representative of the defendant. The judge in the *Moore* case said that the California law was similar to the decisions of the federal courts on the subject.

We know of no federal court ruling which has ever held that a corporation conducting its selling in the manner that this one does is doing business with the state.

The Eighth Circuit Court of Appeals held in *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, F. 1, that a foreign corporation having no warehouse, office or place of business and which neither incurs nor pays any of the expenses of receiving, handling, storing or selling its goods in the state to which it consigns them to a factor who conducts all the business and assumes and pays all expenses incurred in the latter state is not doing business there within the true meaning of the statute relative to the admission of a foreign corporation. Other cases to the same effect are:

Kelley v. Delaware L. & W. R. Co., 170 Fed. 2d 195;

Mueller Brass Co. v. Alexander Milburn Co., 152 Fed. 2d 142; and

Frene v. Louisville Cement Co., 134 Fed. 2d 511.

To hold that *Higgins Industries, Inc.*, is doing business within the State would violate the Constitution of the United States:

If the California court interpreted its statutes, so as to hold that appellee was doing business in California, it would be violative of the Constitution of the United States. The appellant admits that prior to the decision of *McGee vs. International Life Insurance Co.*, 78 S. Ct. 199, 2 L.Ed. 223, decisions of the Federal courts deny the right of California to hold that Higgins is amenable to suit there. It is our opinion that the appellant has placed a completely improper emphasis on this decision. In order to understand this decision, however, the prior decisions must be studied and understood. We will first show conclusively that under these decisions and under the *International Shoe Company vs. State of Washington*, 326 U.S. 310, 66 Sup. Ct. 154, this corporation is not amenable to suit in the State of California, that the lower court was correct in its decision. The *McGee* case will then be discussed and analyzed.

The case that has gone further in allowing a corporation to be sued in a state without violating the Federal Constitution is the case of *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 Sup. Ct. 154. The question presented here was whether or not the Supreme Court of Washington in holding that suit was authorized under the facts as hereafter given was violating the Constitution of the United States. This case arose in the state courts of Washington and reached the Supreme Court of the United States by reason of a writ of certiorari. The Court in this case

held that there must be such activity as would manifest the presence of the corporation in the state. This activity was defined as a continuity of solicitation by agents of the defendant. This solicitation must be continuous and systematic. There were some eleven salesmen paid by the defendant corporation who continuously solicited business in the State of Washington. It was true that the corporation entered into its sales contracts outside the state and had no salesroom, office, showroom, bank accounts, etc., within the state. However, and the Supreme Court emphasizes that the solicitation activities of the corporation were not only continuous and systematic *but gave rise to the liability sued upon*. The case at bar does not meet this test. This case, therefore, is of such a nature that it would be unconstitutional to hold that Higgins was doing business within the state.

Robert M. Green v. Chicago, Burlington & Quincy Railway Co., 27 Sup. Ct. 595, 205 U. S. 530, 51 L. Ed. 916;

Peoples Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 S. Ct.;

International Harvester Co. v. Kentucky, 234 U. S. 589, 34 Sup. Ct. 946; 58 L. Ed. 479.

It is submitted that none of the cases either before or after this Supreme Court decision give any sustenance to appellee's position that the appellee Higgins Industries, Inc., is doing business within the state. *Frene v. Louisville Cement Co.*, *supra*, which was the forerunner of the doctrine enunciated in the *International Shoe Co. v. State of Washington* case, *supra*,

required a regular and continuous course of solicitation by employees of the defendant, plus the fact that their activities in the state give rise to the cause of action.

There are many cases which hold that a corporation doing much more than the appellee was not doing business within the state.

Owens Illinois Glass Co. v. District of Columbia, 204 Fed. 2d 29;

Mueller Brass Co. v. Alexander Milburn Co., *supra*.

Rendleman v. Niagara Sprayer Co., *supra*, wherein it was said "local dealers purchasing goods from foreign corporation and reselling them in due process of business held not agents on whom process against corporation could be served". On the other hand, one employed by the defendant, a foreign manufacturing corporation, and designated service manager in charge of sales and services in a designated territory not a part of Illinois held an agent of defendant upon whom service might lawfully be made.

The Supreme Court once again in the case of *United States v. Scophony*, 68 Sup. Ct. 855, 333 U.S. 795, decided after the *International Shoe Co.* case, still approved the case of *Frene v. Louisville Cement Co.*, *supra*, and said:

"Thus, by substituting practical, business conceptions for the previous hair-splitting legal tech-

nicalities encrusted upon the 'found'—'present'—'carrying-on-business' sequence, the Court yielded to and made effective Congress' remedial purpose. * * * A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even retreating to its headquarters defeat or delay the retribution due."

There can be no doubt but that the Court still holds to the doctrine that mere solicitation, unless it is continued and according to a plan, is not doing business in a state. The Court says:

"Scophony's operations in New York were a continuous course of business before and throughout the period in question here. They consisted in strenuous efforts not simply to save an American 'investment' but to salvage and resuscitate Scophony's whole enterprise from the disasters brought upon it by the war."

We challenge the appellant to produce any case which has held that it is constitutional to hold that a company was doing business which:

1. had no employees or agents regularly and systematically soliciting orders in the state;
2. had no offices, showrooms, sample rooms, bank accounts, paid agents living in the state, no officers of the company living in the state;
3. Which did not deliver the goods in question into the state.

Also, in examining any authority, it must be taken into consideration that the appellant was not domiciled in the state; that the goods were used in a state other than California, and the cause of action arose outside of California.

In concluding this part of the brief, the Court's attention is called to the case of *Elliott & Sons Co. v. King & Co.*, 144 Fed. Supp. 401. This case contains a very fine discussion of the whole problem and thoroughly upholds our contention that California is not the proper place for a suit against Higgins Industries, Inc.

IV.

The burden of proof is upon the plaintiff to establish that Appellee Higgins Industries, Inc. is doing business in California to an extent sufficient to make such foreign corporation amenable to service of process.

Proctor and Schwartz v. Superior Court, 99 Cal. App. 2d 376, 379;

Martin Bros. Electric Company v. Superior Court, 121 Cal. App. 2d 790, 794;

Smith and Wesson, Inc. v. Municipal Court, 136 Cal. App. 2d 673, 676.

V.

It is submitted that the ultimate issue is whether the appellee is doing business within the State of California; not whether California is a proper forum on the theory of balancing convenience and justice. It

is submitted that this should and is the issue, although the appellant argues that the case of *McGee vs. International Life Insurance Co.*, 78 Sup. Ct. 199, 2 L. Ed. 223, decided by the Supreme Court of the United States, and *Henry R. Jahn & Sons vs. Superior Court*, 49 A.C. 881, decided by the Supreme Court of California, have changed the law so that the ultimate issue is solely one of balancing convenience and justice.

In *Smith and Wesson, Inc. v. Municipal Court*, 136 Cal. App. 2d 673, the Court states at page 678: "As indicated in that case (*Martin Bros. Electric Co. v. Superior Court*, *supra*) the question of the balance of convenience and justice is not the ultimate question to determine but it must be supported by competent evidence that the corporation is doing business within this state as contemplated by law."

In *Martin Bros. Electric Co. v. Superior Court*, just as in *Smith and Wesson, Inc., v. Municipal Court*, articles manufactured by the defendant in a foreign state were sold and used in California and the plaintiff was a California resident who was injured in California. After holding that the existence of a California wholesaler who dealt in defendant's products did not establish that defendant was doing business in California, the court said at pages 793-4:

"Respondent relies heavily upon the holding in the *Fielding* case that, 'In the final analysis it would seem that this is really not a question of the power of the state, but whether there is af-

forded to both parties a greater amount of justice by allowing suit in this state rather than requiring it elsewhere. (See 20 C.J.S. 148; *International Shoe Co. v. Washington*, 326 U.S. 310 (66 S Ct. 154, 90 L.Ed 95, 161 A.L.R. 1057).)'

"Such a statement does not imply that a court may, without supporting evidence, exercise its absolute discretion and apply its own ideas of justice and equity in the determination of such questions. Where a defendant properly moves to quash service of summons and the evidence presented is conflicting, the burden of proof is on the plaintiff to produce evidence from which the court can determine which course is just and equitable to both parties. (*Briggs v. Superior Court*, 81 Cal. App. 2d 270 (183 P. 2d 758); *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582 (84 P. 289).) The facts adduced at the hearing of the motion in this case are not sufficient to make petitioner amenable to the process of the courts of this state"

(The facts so adduced by the plaintiff were that she was injured in California and that defendant's machines were sold at wholesale by Reid and Sibell, a San Francisco concern.)

We think that the reasoning of Judge Grim in the case of *Florio v. Powder-Power Tool Corp.*, 148 Fed. Supp. 843, is a good example of what is meant by doing business so as to meet venue requirements. He quotes from the Restatement of the Law of Conflict of Law. He said: "In explaining and amplifying its definition the Restatement gives an illustration (Re-

statement Conflict of Laws, Sec. 167, Illus. 3). “ ‘A incorporated in state X, manufactures automobiles and ships them to a dealer in state Y, giving to dealer exclusive territory, with power to A to inspect the dealer’s stocks and accounts. The dealer agrees to charge only certain prices and to maintain a supply of repair parts. A is not doing business in Y.’ ”

It is submitted that this destroys any argument that it is not necessary that the corporation be held to be doing business before the question of convenience is discussed.

The next question which must be discussed is whether the *McGee* case and the *Jahn* case change in any way this accepted rule of law.

In the *McGee* case a life insurance company sold policies by mail to policyholders within the State of California. The law of California made the insurance company amenable to suit at the instance of the policyholder in that state. The Supreme Court held this did not violate the due process clause. There are great distinctions between this case and the case at bar. In the first place the regulation of life insurance has always been held by the Supreme Court to be in the states. Further this business is clothed with a public interest and is thoroughly regulated by law. In this particular case the appellant is a resident of the State of Arizona. The only resident here involved in the State of California is the defendant, McCauley Lumber & Flooring Company. Great emphasis was

given to the fact that the contract was delivered in California. In our case at bar the flooring was delivered in Arizona. The court further says when claims are small or moderate in amount an individual claimant frequently could not afford the cost of bringing an action in a foreign forum, thus in effect making the company judgment proof although the insurance is sold for the purpose of paying claims. The whole purpose of the insurance can be defeated if small policyholders must sue in a foreign state. Furthermore, all the laws of the forum regulating insurance can be avoided by such procedure.

The equities in this case are all on Higgins' side. What the court has done in the *McGee* case is to balance the interest of the individual policyholder, the hardships which are placed upon him against the hardships placed upon an insurance company selling small policies to individuals. None of this is applicable to the case at bar.

Higgins does not sell to homeowners. Higgins sells to large contractors. L. D. Reeder is a large contractor domiciled in Arizona with an office in California and several other states. Higgins will be materially injured if it is forced to defend suits in every state of the union where its flooring is used. Particularly is this true when the appellee sells to a distributor who in turn sells the flooring. The floors are laid by another contractor. The only liability of Higgins is for defective flooring.

There is no reason analogous to that of allowing a small policyholder to sue a foreign life insurance company in California for holding that a manufacturer who sells his articles to distributors in interstate commerce in the 48 states should be forced to defend suits in any and all of these states merely for the convenience of large contractors or distributors. This would create a burden on interstate commerce. There can be no doubt but that under any definition Higgins is not doing business in California. If it is doing business in California, then it is doing business in every state in the union where it ships to a contractor or a distributor f.o.b. New Orleans. To allow a recovery in this case under the facts will be a great departure from the past and will wreck the interstate commerce clause. To carry the argument one step further, it would become apparent that anyone manufacturing goods, automobiles, manufacturers, boat manufactures, could be sued in any state where the products eventually were used. Higgins does not do business, the affidavits will show, any differently from any other manufacturing plant which is distributing its products. It does not have a patented process; it does not have a process that requires any help from Higgins in laying; it just sells block flooring in interstate commerce to distributors like McCauley. It is submitted that appellee has shown conclusively that the appellee is not doing business in the State of California. Under no decision cited by the appellant can it possibly be held that appellee is doing anything other than business in interstate commerce.

It is further submitted that under no decision cited can it be held to be amenable to suit in California under any recognized concept of law. However, the appellant claims that a new rule of law has been enunciated in the recent cases of *Henry A. Jahn & Son, Inc. vs. Superior Court*, 49 A.C. 881 and *McGee vs. International Life Insurance Company*. The first case was decided by the Supreme Court of California and the second by the United States Supreme Court. It is submitted that these cases in no way change the general rule of law as to what is necessary to make an ordinary corporation amenable to suit in a foreign state. However, for the purpose of argument, assuming that the law now is that the court, if the defendant has any contact with the state although not doing business therein must balance the hardship between the suing plaintiff and the defendant to determine whether or not the due process clause of the United States Constitution is violated. The determinative factor then is a balancing of the interest between the plaintiff and the defendant. *However, a court can only balance this interest if the plaintiff is a resident of the state where the suit is brought.* The very basis of the doctrine is that a defendant by having contact with the citizen of a state or by selling in interstate commerce into the state gives that state an interest in protecting the rights of its citizen. This alleged doctrine is not applicable to the case at bar, because the appellant is a foreign corporation to the State of California. The contract was for delivery of flooring in Arizona for a building project in Arizona. The cause

of action arose in Arizona where the appellant is domiciled.

In all of the cases cited by the appellant in its brief, except one, suit was brought by a resident of the State of California. The one case where suit was allowed by a resident of a foreign state was *McClanahan vs. Trans-America Ins. Co.*, 149 Cal. App. 2d 171; 307 P. 2d 1023. However, in that case there can be no doubt but that the Trans-America Insurance Company was actually and literally doing business within the State of California. That case is not any authority whatsoever for the appellant's position in this case.

In the *Jahn* case, *supra*, the plaintiff, a resident of California, sued the defendant who regularly purchased goods in the state, the whole contract between the parties being made in and arising in the State of California. It is to be particularly noted that the court squarely lays the basis of its decision upon the *International Shoe Company* case *supra*. This disposes of the case but the appellant still argues that the ratio decidendi of the case is that there would have been a hardship on the plaintiff if the defendant had not been deemed present in the state. The appellant relies upon the language, we presume.

"There is no constitutional requirement that this hardship has to be invariably borne by the plaintiff whenever the defendant is not deemed present in the state of the plaintiff's residence."

It is admitted that this language goes further than the question of the defendant's doing business in the state, but it equally demands that the state applying this theory be the state of the plaintiff's residence.

A reading of the *McGee* case, *supra*, shows clearly that its doctrine is only applicable to residents. The Court said:

"It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay the claim."

The *McGee* case, of course, is an unusual case in that it deals with insurance which is strictly regulated. This has been discussed previously, but the Court's attention is again called to this fact.

In the case at bar the appellant corporation was organized and exists under the laws of the State of Arizona. It did not purchase the goods in question from the appellee but from the McCauley Lumber & Flooring Company. The goods were shipped f.o.b. New Orleans to Phoenix, Arizona—never were within the State of California and were to be used in California. The affidavits submitted by the appellant show that the Arizona corporation was one of a group of corporations. One company is a Washington company, the others were described as L. D. Reeder Company of Sacramento, L. D. Reeder Company of Los Angeles and L. D. Reeder Company of Portland, Oregon. Un-

der these circumstances, it must be presumed that the appellant had either a financial or tax reason for having the purchase made by an Arizona corporation instead of a California corporation. It is inconceivable, under these circumstances, that any such doctrine as contended for by the appellant can be applied in order to protect a non-resident corporation. Furthermore, the *McGee* case, as are the other California cases cited, is based upon claims by individual plaintiffs who would suffer undue hardship by having to sue in a foreign jurisdiction. This does not apply to corporations doing business in various states.

Under these circumstances there can be no jurisdiction sufficient to allow a foreign defendant engaged in interstate commerce to defend a suit in California when (1) there was no privity of contract between it and the plaintiff; (2) the contract was not performed in California and the cause of action arose in the domicile of the plaintiff corporation, and (3) the plaintiff corporation is not a resident of California and the only contact that the State of California had with the matter was that this foreign corporation had a joint office with several domestic corporations and other foreign corporations in the State of California and entered into a contract with still another corporation who was not an agent of the appellee.

To allow suit in this matter would mean that corporations having offices in many states could elect the jurisdiction to sue any defendant corporation who

did business in interstate commerce. In other words, Higgins Industries, under the doctrine would be subject to suit by any building contractor or wholesaler of products in any state where corporations did business, although it was not domiciled there and although Higgins merely sold in interstate commerce. This would most certainly create a burden on interstate commerce. If the doctrine is applied in this case then there is no such thing as interstate commerce and any corporation selling merchandise for use in a state will be subject to suit in that state regardless of whether the cause of action arose in the state or not.

It is, therefore, submitted that under no rule of law and under no decision is Higgins Industries, Inc. amenable to suit in the State of California.

VENUE.

However, even if the law does reach the point where the appellee could be sued in California in this particular case it would be based not upon the fact that Higgins was doing business but that the State of California by reason of the residence of the appellant there and some contact of Higgins with the state would allow suit without violating the due process clause. Such a rule of law would be of no help to the appellant in this case. If jurisdiction were allowed on this basis the appellee still could not be sued in the Federal Court in California because of the venue provisions.

Since this suit is based upon diversity of citizenship insofar as venue is concerned, the suit must be brought either at the residence of the appellant or of the appellee.

VI.

For venue purposes a corporation must be sued in the judicial district in which it is incorporated or licensed to do business or is doing business.

Section 1391, Title 28, U.S.C.A.

The question of doing business so as to determine whether the venue is proper must be determined under the law of the federal courts.

- Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 S. Ct. 526, 42 L. Ed. 964;
- So. Pacific Co. v. Denton*, 146 U.S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942;
- Goldey v. Morning News*, 156 U.S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517;
- Mechanical Appliance Co. v. Castleman*, 215 U.S. 518, 30 Sup. Ct. 125, 54 L. Ed. 272;
- Cain v. Publishing Co.*, 232 U.S. 124, 34 Sup. Ct. 284, 59 L. Ed. 534.

The cases that have been previously cited show conclusively that no federal court has ever held that a corporation which had no activities whatsoever in the state was doing business there.

The appellant is not a resident of California. The rule has been and still is that a corporation is a resident in the state where it is incorporated and domiciled. See Encyclopedia of Federal Procedure, Vol. 3, Section 4.13, Page 29, where it is said:

“But it long became the settled law that, for purposes of suit, a corporation created by a state was, although an artificial person, to be considered as a citizen of that state, and that there was a conclusive presumption of law that the persons composing it were citizens of the same state. It was considered manifest, therefore, that the venue of a suit by or against a corporate party was controlled by the same general statutory rules applicable to natural persons, subject only to such qualifications as necessarily result from the artificiality of the corporate being. Insofar as citizenship, as distinguished from residence or inhabitancy, was a factor in determining the place for suit, it became the established rule that a corporation created by a state was a citizen of the state of its creation. Likewise, the rule became equally well settled that such a corporation was a resident and inhabitant of the state which gave it being, and in the case of multiple incorporation, in each state which gave it being.”

The appellant, therefore, is clearly a citizen and resident of the State of Arizona and cannot bring a suit in California unless the defendant is a resident of California, or unless it is a foreign corporation doing business in California. For venue purposes the defendant, as is shown by Section 1391 of Title 28,

U.S.C.A., may be sued in a district in which it is doing business. Otherwise, it is not a resident of California.

Respectfully submitted,

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CERTIFICATE.

This is to certify that copies of this brief have been served on opposing counsel this day of July, 1958.

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